Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

JEFFREY P. CURTIS AND MARTIN A. SAX,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies retroactively on collateral review to sentences imposed before *Apprendi* was decided.

2. Whether 21 U.S.C. §§ 841 and 846 are unconstitutional under the Fifth and Sixth Amendments to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey P. Curtis and Martin A. Sax respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a, *infra*) is reported at 294 F.3d 841 (7th Cir. 2002). The orders of the district court (Pet. App. 6a-13a, *infra*) are unreported. The opinion of the court of appeals in Sax's case on direct review (Pet. App. 14a-44a, *infra*) is reported at 39 F.3d 1380 (7th Cir. 1994). The opinion of the court of appeals in Curtis's case on direct review (Pet. App. 45a-62a, *infra*) is reported at 37 F.3d 301 (7th Cir. 1994). This Court's denial of Curtis's petition for a writ of certiorari (Pet. App. 63a, *infra*) is reported at 513 U.S. 1154 (1995).

JURISDICTION

The court of appeals entered judgment on June 19, 2002. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ., and to be informed of the nature and cause of the accusation." 21 U.S.C. § 846 provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the

object of the attempt or conspiracy." Petitioners have reproduced 21 U.S.C. § 841 at Pet. App. 64a-76a, *infra*.

STATEMENT

On September 9, 1992, a grand jury indicted petitioners Jeffrey P. Curtis and Martin A. Sax on one count of conspiracy to distribute and possession with intent to distribute more than 1000 kilograms of marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Pet. App. 20a-21a. The indictment also charged Curtis with one count of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), and Sax with two counts of money laundering, in violation of § 1956(a)(1)(A)(i) and 18 U.S.C. § 2. Pet. App. 21a. The indictment alleged that petitioners were suppliers in a conspiracy to transport large quantities of marijuana from Arizona to Illinois. Pet. App. 20a-21a. The indictment further alleged that petitioners laundered money derived from the marijuana conspiracy. Pet. App. 21a.

Petitioners' cases proceeded to separate jury trials. In neither case did the district court instruct the jury to make any finding concerning drug quantity. Pet. App. 2a. A jury convicted Sax on all three counts. Pet. App. 21a. Curtis was convicted on the § 846 drug conspiracy count, but acquitted of the money laundering charge. Pet. App. 49a.

Section 841(b) provides for varying sentence ranges for defendants convicted of violating §§ 841(a)(1) and 846, depending on the drug quantity involved. A finding of more than 1000 kilograms places a defendant's conviction under § 841(b)(1)(A)(vii), which permits a sentence of not less than ten years or more than life. See 21 U.S.C. § 841(b)(1)(A)(vii). A conviction involving between 100 and 1000 kilograms of marijuana allows for a sentence of not less than five years or more than forty years imprisonment. See *id.* § 841(b)(1)(B)(vii). A finding of less than fifty kilograms of

marijuana permits a sentence of not more than five years imprisonment. See *id.* § 841(b)(1)(D). See also *United States v. Mietus*, 237 F.3d 866, 874 (7th Cir. 2001) ("[T]he default statutory maximum sentence for possession of an unspecified amount of marijuana is 5 years.").

In these cases, the district court found that petitioners' offenses involved more than 1000 kilograms of marijuana. Pet. App. 2a. After calculating Sax's base offense level, the district court sentenced Sax to 210 months imprisonment. Pet. App. 10a. The court of appeals affirmed Sax's convictions but vacated his sentence and remanded for the district court to increase his base offense level. Pet. App. 43a-44a. On remand, the district court imposed the adjustment and sentenced Sax to 262 months imprisonment. Pet. App. 10a.

The district court sentenced Curtis to 262 months imprisonment. Pet. App. 45a. The court of appeals affirmed. Pet. App. 46a. This Court denied Curtis's petition for certiorari. Pet. App. 63a.

On June 15, 2001, Curtis filed his first habeas petition under 28 U.S.C. § 2255, asking the district court to correct his sentence in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. App. 6a-7a. Sax filed his first § 2255 petition on June 20, 2001, also asking the district court to correct his sentence under *Apprendi*. Pet. App. 10a.

On June 22, 2001, the district court dismissed both petitions as time-barred under § 2255's one-year limitations period. Pet. App. 8a, 12a. On June 29, 2001, both petitioners filed notices of appeal along with petitions for certificates of appealability. The district court denied certificates of appealability.

Consolidating Sax's case with Curtis's case, the court of appeals granted petitioners' requests for certificates of appealability, noting that since the district court's denial of

certificates, the Seventh Circuit decided that initial petitions making *Apprendi* claims are timely under 28 U.S.C. § 2255(3). Pet. App. 2a. The court of appeals issued certificates of appealability and directed the parties to brief the question whether *Apprendi* applies retroactively to initial habeas petitions. Pet. App. 2a.

The court of appeals affirmed the denial of petitioners' § 2255 motions, holding that *Apprendi* does not apply retroactively to initial habeas petitions. The court rejected petitioners' argument that *Apprendi* made a substantive change in the law, instead holding that "*Apprendi* does not alter which facts have what legal significance." Pet. App. 4a. The court also rejected petitioners' argument that *Apprendi* fits within the "watershed" exception to the general bar created by *Teague v. Lane*, 489 U.S. 288 (1989), to applying new rules of criminal procedure to cases on collateral review. Relying on *United States v. Cotton*, 122 S. Ct. 1781 (2002), the court held that *Apprendi* did not set a "bedrock rule of procedure." Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

I. The Application of *Apprendi* to Cases on Collateral Review Is a Recurring and Important Issue That this Court Should Resolve.

Determining whether *Apprendi* applies retroactively on collateral review raises two questions. First, did *Apprendi* announce a substantive change in the law, thereby rendering inapplicable the general bar created by *Teague v. Lane*, 489 U.S. 288 (1989), to applying new rules of criminal procedure to cases on collateral review? Second, if *Apprendi* is merely a new rule of criminal procedure, then does *Apprendi* fit within the "watershed" exception to *Teague*?

All seven courts of appeals to have confronted these questions, including the court below, have held that *Apprendi* does not apply retroactively to initial habeas petitions. Pet. App. 5a; *United States v. Brown*, No. 01-10116, 2002 WL 2027346, at *6 (5th Cir. Sept. 5, 2002); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002), petition for cert. filed, No. 02-6125 (Aug. 30, 2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002), petition for cert. filed, No. 02-6067 (Aug. 26, 2002); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002); *United States v. Moss*, 252 F.3d 993, 997-98 (8th Cir. 2001), cert. denied, 122 S. Ct. 848 (2002); *United States v. Sanders*, 247 F.3d 139, 147 (4th Cir.), cert. denied, 122 S. Ct. 573 (2001).

However, a number of federal judges have concluded that *Apprendi* does apply retroactively to initial petitions. See *McCoy*, 266 F.3d at 1271-72 (Barkett, J., concurring); *United States v. Clark*, 260 F.3d 382, 388 (5th Cir. 2001) (Parker, J., dissenting); *Moss*, 252 F.3d at 1004 (R. Arnold, J., dissenting); *Hoffman v. Arave*, 236 F.3d 523, 547-48 (9th Cir.) (Pregerson, J., concurring), cert. denied, 122 S. Ct. 323 (2001); *United States v. Shark*, 158 F. Supp.2d 43, 64 (D.D.C. 2001); *Rosario v. United States*, No. 00-9695, 2001 WL 1006641, at *2-4 (S.D.N.Y. Aug. 30, 2001); *United States v. Hernandez*, 137 F. Supp.2d 919, 928-29 (N.D. Ohio 2001); *Reynolds v. Cambra*, 136 F. Supp.2d 1071, 1087-89 (C.D. Cal. 2001), rev'd, 290 F.3d 1029 (9th Cir. 2002); *Parise v. United States*, 135 F. Supp.2d 345, 349 (D. Conn. 2001); *Jackson v. United States*, 129 F. Supp.2d 1053, 1068-69 (E.D. Mich. 2001), rev'd on other grounds, No. 01-1309, 2002 WL 2026583 (6th Cir. Sept. 5, 2002); *Darity v. United States*, 124 F. Supp.2d 355, 360-61 (W.D.N.C. 2000), rev'd, *Sanders*, 247 F.3d 139; *United States v. Murphy*, 109 F. Supp.2d 1059, 1064 (D. Minn. 2000), rev'd, 268 F.3d 599 (8th Cir. 2001), cert. denied, 122 S. Ct. 1189

(2002). Thus, with few avenues left in the lower courts for the issue to percolate further, there is substantial dissent from the majority view that *Apprendi* does not apply retroactively to cases on collateral review.

The issue of whether *Apprendi* applies retroactively is of paramount importance. The government has argued that a retroactive application of *Apprendi* could reach "'tens of thousands of convictions and sentences in drug cases alone.'" *Darity*, 124 F. Supp.2d at 365. Therefore, the issue's importance, the full airing that the lower courts have provided, and the significant dissent from the majority view all counsel in favor of the Court using this case to determine conclusively whether *Apprendi* applies retroactivity to cases on collateral review.

A. Lower Court Judges Disagree as to Whether *Apprendi* Changes Substantive Law.

Teague's general bar to applying new rules of criminal procedure to cases on collateral review does not apply to Supreme Court decisions that change the substantive law. See *Bousley v. United States*, 523 U.S. 614, 620 (1998). A Supreme Court ruling is substantive when it "decides the meaning of a criminal statute." *Id.* The addition of an element to a criminal offense is a substantive change. See, *e.g.*, *Santana-Madera v. United States*, 260 F.3d 133, 139 (2d Cir. 2001), cert. denied, 122 S. Ct. 817 (2002); *Lanier v. United States*, 220 F.3d 833, 836 (7th Cir.), cert. denied, 531 U.S. 930 (2000); *United States v. Dashney*, 52 F.3d 298, 298 (10th Cir. 1995).

The courts of appeals are divided as to *Apprendi's* effect on the status of drug quantity as an element or a sentencing factor under § 841. Before *Apprendi*, every court of appeals to have considered the question held that drug quantity was merely a sentencing factor. See *United States v. Moss*, 252 F.3d 993, 998 (8th Cir. 2001). Most jurisdictions now hold, however, that

Apprendi requires courts to treat drug quantity as an element of the offense under § 841. See *United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc) (collecting cases). See also *Harris v. United States*, 122 S. Ct. 2406, 2414 (2002) ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime . . . ").

Courts treating drug quantity as an element of the offense under § 841 typically base their decisions on *Apprendi's* holding that a factual finding is an element when "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." 530 U.S. at 494. Because drug quantity may "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," the lower courts have reasoned that *Apprendi* requires them to treat drug quantity as an element of the offense under § 841. See, *e.g.*, *Thomas*, 274 F.3d at 663.

The Seventh Circuit, however, has held that *Apprendi* does not require courts to treat drug quantity as an element of the offense. See *United States v. Bjorkman*, 270 F.3d 482, 491-92 (7th Cir. 2001), cert. denied, 122 S. Ct. 2290 (2002). The *Bjorkman* court noted that the "considerations" in § 841(b), such as drug quantity, are not elements with regard to minimum penalties. *Id.* at 491. Because "nothing in § 841(b) distinguishes minimum from maximum penalties," the court concluded that "quantities determining maximum penalties cannot be 'elements' of the offense either." *Id.* Furthermore, the panel stated, *Apprendi* addressed a state statute, not § 841. Therefore, according to the court, "*Apprendi* does not rewrite or change the elements of any federal offense." *Id.*

The circuit split regarding whether *Apprendi* requires courts to treat drug quantity as an element of the offense under § 841

is important to this case because of the split's effect on whether courts should apply *Apprendi* retroactively to cases on collateral review. If *Apprendi* does require courts to treat drug quantity as an element of the offense, then *Apprendi* makes a substantive change in the law that courts must apply retroactively on collateral review. *Cf. Santana-Madera*, 260 F.3d at 139; *Lanier*, 220 F.3d at 836; *Dashney*, 52 F.3d at 298. If, on the other hand, *Apprendi* has no effect on § 841's elements, then *Apprendi* does not make a substantive change and courts must proceed to determine whether either of *Teague's* exceptions apply.

Indeed, a number of federal judges have concluded that because *Apprendi* requires courts to treat drug quantity as an element of the offense under § 841, *Apprendi* makes a substantive change in the law that courts should apply retroactively to initial habeas petitions. See *McCoy*, 266 F.3d at 1271-72 (Barkett, J., concurring); *Clark*, 260 F.3d at 388 (Parker, J., dissenting); *Rosario*, 2001 WL 1006641, at *2-4; *Hernandez*, 137 F. Supp.2d at 928-29; *Darity*, 124 F. Supp.2d at 360-61. As the *Hernandez* court explained, "*Apprendi's* holding encompasses a substantive construction, based on constitutional law, of any statute that treats facts that increase the penalty for a crime beyond the prescribed statutory maximum as a sentencing factor rather than as an element of the crime." 137 F. Supp.2d at 928.

All four courts of appeals to have addressed the issue, including the court below, have reached the opposite conclusion, holding that *Apprendi* is purely a procedural ruling. Pet. App. 4a; *Brown*, 2002 WL 2027346, at *4; *McCoy*, 266 F.3d at 1257 n.16; *Sanders*, 247 F.3d at 147. These courts usually rely for their conclusions on *Apprendi's* statement that "[t]he substantive basis for New Jersey's enhancement is . . . not at issue; the adequacy of New Jersey's procedure is." 530 U.S. at 475. But this reliance is misplaced, because it takes the

Court's statement out of context. In the prior sentence, the *Apprendi* Court noted that "although the constitutionality of basing an enhanced sentence on racial bias was argued in the New Jersey courts, that issue was not raised here." *Id.* Thus, the Court simply was saying "that the constitutionality of the 'substantive basis' of the penalty enhancement - racial bias - was not before the court." *McCoy*, 266 F.3d at 1272 (Barkett, J., concurring).

The court below provided an additional basis for its conclusion, stating that "*Apprendi* does not alter which facts have what legal significance" Pet. App. 4a. But this basis relies on the proposition that *Apprendi* does not require courts to treat drug quantity as an element under § 841. If drug quantity is now an element of the offense, as most courts of appeals now hold, then *Apprendi* did "alter which facts have what legal significance" by requiring courts to treat drug quantity as an element.

B. Lower Court Judges Disagree as to Whether *Apprendi* Fits Within the "Watershed" Exception to *Teague*.

There are two exceptions to *Teague's* general bar against applying new rules of criminal procedure to cases on collateral review. The second exception is at issue here, permitting application of "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993) (internal quotation marks omitted). To fall within the "watershed" exception, the new rule must (1) improve the accuracy of the conviction and (2) "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal quotation marks omitted) (italics in original).

In *Apprendi*, the four dissenters said of the majority's decision: "Today, in what will surely be remembered as a *watershed* change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones* [*v. United States*, 526 U.S. 227 (1999)]." 530 U.S. at 524 (O'Connor, J., dissenting) (emphasis added). The *Apprendi* dissenters' use of the word "watershed," and the majority's silence in responding, has created confusion among the lower courts as to whether courts should treat *Apprendi* as a "watershed" decision within the meaning of *Teague*.

A number of federal judges have relied, at least in part, on the *Apprendi* dissent's statement that the majority's decision was "a watershed change in the constitutional law" in holding that *Apprendi* is a watershed ruling under *Teague*. See *McCoy*, 266 F.3d at 1272 n.23 (Barkett, J., concurring); *Moss*, 252 F.3d at 1004 (R. Arnold, J., dissenting); *Hoffman*, 236 F.3d at 547-48 (Pregerson, J., concurring); *Shark*, 158 F. Supp.2d at 64; *Hernandez*, 137 F. Supp.2d at 932; *Reynolds*, 136 F. Supp.2d at 1087-89; *Parise*, 135 F. Supp.2d at 349; *Jackson*, 129 F. Supp.2d at 1068-69; *Darity*, 124 F. Supp.2d at 360-61; *Murphy*, 109 F. Supp.2d at 1064. Judge Richard Arnold, for instance, stated that the *Apprendi* dissenters' statement "almost explicitly endorsed a *Teague* exception." *Moss*, 252 F.3d at 1004 (R. Arnold, J., dissenting).

In addition to relying on the *Apprendi* dissenters' statement that the majority's decision was "a watershed change," several lower court judges have found that *Apprendi* meets the two requirements to fit within the watershed exception. Judge Arnold, for instance, concluded that *Apprendi* improves the accuracy of convictions by raising the standard for determining factors that subject a criminal defendant to a higher term of imprisonment from a preponderance of the evidence to beyond a reasonable doubt. See *id.* at 1004 (R. Arnold, J., dissenting). See also *In re Winship*, 397 U.S. 358, 363 (1970) ("The

reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error."). In determining that *Apprendi* alters our understanding of bedrock procedural elements essential to the fairness of a proceeding, Judge Arnold relied on the *Apprendi* Court's characterization of the case:

> "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6."

252 F.3d at 1004 (R. Arnold, J., dissenting) (quoting *Apprendi*, 530 U.S. at 476-77).

However, every court of appeals to have decided the issue, including the court below, has held that *Apprendi* does not meet the requirements of the watershed exception. Pet. App. 5a; *Brown*, 2002 WL 2027346, at *6; *Mora*, 293 F.3d at 1219; *Sanchez-Cervantes*, 282 F.3d at 667; *McCoy*, 266 F.3d at 1258; *Moss*, 252 F.3d at 997-98; *Sanders*, 247 F.3d at 147. In so holding, the court below relied on *United States v. Cotton*, 122 S. Ct. 1781, 1786-87 (2002), where this Court held that the omission of drug quantity from an indictment was not plain error because of the overwhelming evidence of the defendants' guilt. But *Cotton* essentially was making a prejudice determination. The watershed exception does not ask whether the asserted error prejudiced the petitioner. To the extent that a prejudice determination is necessary, this inquiry occurs under the procedural default "cause and prejudice" analysis.

In sum, whether *Apprendi* applies retroactively to cases on collateral review is an issue of overriding importance. The lower courts have examined the issue fully, with substantial

dissent from the majority view that *Apprendi* does not apply retroactively to initial habeas petitions. Therefore, the Court should use this case to declare a definitive answer as to *Apprendi's* retroactivity.

II. *Apprendi* Casts Significant Doubt as to the Constitutionality of 21 U.S.C. §§ 841 and 846.[1]

Apprendi invalidated a New Jersey "hate crimes" statute because the statute authorized judges to sentence defendants beyond the statutory maximum based on a judge's finding, by a preponderance of the evidence, that the defendant's motive in committing the crime was to intimidate the victim based on a particular characteristic of the victim. 530 U.S. at 491. The *Apprendi* dissenters recognized that the similarities between New Jersey's hate crimes statute and § 841 suggest that § 841 is unconstitutional. Justice O'Connor said that the majority's "reasoning strongly suggests that" federal determinate-sentencing schemes, such as that found in § 841, are unconstitutional. *Apprendi*, 530 U.S. at 550-51 (O'Connor, J., dissenting). Likewise, after citing § 841, Justice Breyer expressed his concern that "the majority's rule creates serious uncertainty about the constitutionality of such statutes and

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[1] This issue is properly presented. In their opening brief, petitioners asked the court of appeals to amend the certificates of appealability to include the issue of § 841's constitutionality. The court of appeals denied the government's opposition to petitioners' request to amend the certificates, stating that "an appellee can safely ignore the issues in the appellant's brief which were not included in the certificate of appealability unless this court specifically tells the appellee to brief the additional issues." The court of appeals' failure to address the constitutionality of § 841 constitutes an implicit rejection of petitioners' argument. The court of appeals presumably did not address petitioners' argument because it had rejected an identical argument in *United States v. Brough*, 243 F.3d 1078 (7th Cir.), cert. denied, 122 S. Ct. 203 (2001).

about the constitutionality of the confinement of those punished under them." *Id.* at 564-65 (Breyer, J., dissenting).

The uncertainty surrounding § 841's constitutionality, as expressed by four Justices of this Court, raises an important question that the Court should resolve now. From October 1999 through September 2000, over 24,000 defendants, or more than 40% of all defendants convicted of federal crimes, were convicted for violating federal drug laws. See U.S. Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics, Figures A-B. Thus, the constitutionality of §§ 841 and 846 is an issue potentially affecting tens of thousands of federal prisoners. The longer the Court waits to determine the constitutionality of these statutes, the greater the harm should the Court ultimately hold them to be unconstitutional. Therefore, the Court should use this case to settle the issue of whether §§ 841 and 846 remain constitutional after *Apprendi*.

Section 841's constitutionality depends on whether Congress intended drug quantity to be an element of the offense for a jury to decide or a sentencing factor for judicial determination. If Congress intended the latter, then § 841 is unconstitutional because "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Apprendi*, 530 U.S. at 490.

Every Court of Appeals to have examined the issue holds that § 841 remains constitutional after *Apprendi*. See *United States v. Buckland*, 289 F.3d 558, 562 (9th Cir. 2002) (en banc); *United States v. Valdez-Santana*, 279 F.3d 143, 146 (1st Cir. 2002); *United States v. Kelly*, 272 F.3d 622, 623 (3d Cir. 2001); *United States v. McAllister*, 272 F.3d 228, 232-33 (4th Cir. 2001); *United States v. Woods*, 270 F.3d 728, 729-30 (8th Cir. 2001), cert. denied, 122 S. Ct. 1342 (2002); *United States v.*

Cernobyl, 255 F.3d 1215, 1219 (10th Cir. 2001); *United States v. Martinez*, 253 F.3d 251, 256 n.6 (6th Cir. 2001); *United States v. Brough*, 243 F.3d 1078, 1080 (7th Cir.), cert. denied, 122 S. Ct. 203 (2001); *United States v. Candelario*, 240 F.3d 1300, 1311 n.16 (11th Cir.), cert. denied 533 U.S. 922 (2001); *United States v. Slaughter*, 238 F.3d 580, 582 (5th Cir.) cert. denied, 532 U.S. 1045 (2001). The Seventh Circuit's decision in *Brough* is typical of the reasoning used to uphold § 841's constitutionality. The *Brough* court stated:

> If Congress had specified that only judges may make the findings required by § 841(b), or that these findings must be made by a preponderance of the evidence, then § 841 would create a constitutional problem. But the statute does not say who makes the findings or which party bears what burden of persuasion. Instead the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden.

243 F.3d at 1079.

Thus, after determining that Congress did not specifically state whether judges or juries should determine drug quantity, the *Brough* court abandoned any further attempt at discerning congressional intent. This analysis is wholly insufficient under this Court's precedents.

Section 841's text demonstrates that Congress intended drug quantity to be a sentencing factor for judges, not juries, to decide. Section 841(a), entitled "Unlawful acts," appears to set forth the elements of the offense, providing that "it shall be unlawful for any person knowingly or intentionally– (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." Section 841(b),

entitled "Penalties," provides that "any person who violates subsection (a) of this section shall be sentenced as follows." The separation of subsection (a) from (b) and the textual differences between the provisions shows, in several ways, Congress's intent to treat drug quantity as a sentencing factor for judicial determination.

First, § 841(a)'s title of "Unlawful acts" demonstrates that subsection (a) contains the conduct that the government must prove to convict. See *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting "that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute"). On the other hand, § 841(b)'s title of "Penalties" suggests that the government need not prove the factors that subsection (b) lists to convict; instead, the title implies that subsection (b) is relevant only to punishment.

Second, § 841(a)'s statement that "it shall be unlawful" for any person to engage in the conduct that subsection (a) specifies demonstrates that Congress intended that subsection (a) contains the only conduct that the government must prove to convict. Section 841(b) contains no such statement, suggesting that the government need not prove the factors that subsection (b) lists. The government's brief in *Apprendi* acknowledges § 841's separation of elements from sentencing factors, stating that § 841

> sets out, in subsection (b), a set of statutory sentencing factors relating primarily to the type and quantity of drugs involved in a given offense . . . . Section 841 reflects a legislative judgment that certain elements are necessary to constitute a criminal offense, without proof of which no punishment is warranted, while other factors are highly relevant to setting an appropriate sentence. Congress's very separation of those factors,

> such as type and quantity of particular drugs, into separate sentencing provisions demonstrates a judgment that they are not essential to the finding of criminality.

2000 WL 194804, at *15-16 (Brief of the United States as Amicus Curiae). See also *United States v. Buckland*, 289 F.3d at 564 (noting the government's position that the pre-*Apprendi* interpretation of § 841, which held that drug quantity was a sentencing factor for the court to decide under a preponderance of the evidence standard, "reflects Congress's intent in enacting the federal drug statutes").

Third, § 841(b) states that "any person who violates subsection (a) shall be sentenced as follows." 21 U.S.C. § 841(b); see also § 841(b)(1)(A) ("In the case of a violation of subsection (a) of this section involving . . . such person shall be sentenced . . ."); § 841(b)(1)(B) (same). These references to violating subsection (a) show Congress's "understanding that the violation of section 841 occurs when one completes the conduct recited in section 841(a)." *United States v. Promise*, 255 F.3d 150, 171 (4th Cir. 2001) (Luttig, J., concurring), cert. denied, 122 S. Ct. 2296 (2002). In other words, "only subsection (a) can be violated. Subsection (b) only provides the penalties for a violation of subsection (a)." *United States v. Buckland*, 259 F.3d 1157, 1163 (9th Cir. 2001), rev'd en banc, 289 F.3d 558 (9th Cir. 2002). See also *Harris v. United States*, 122 S. Ct. 2406, 2411 (2002) ("Federal laws usually list all offense elements 'in a single sentence' and separate the sentencing factors 'into subsections.'").

Finally, Congress demonstrated its intent to treat drug quantity as a sentencing factor for judges to decide by including drug quantity's role in § 841 in the same subsection where it provides for enhancements for prior felony drug offense convictions, which are "as typical a sentencing factor as one might imagine." *Almendarez-Torres*, 523 U.S. at 230.

Therefore, § 841's text demonstrates congressional intent to treat drug quantity as a judge-determined sentencing factor, not an element decided by a jury. See *Promise*, 255 F.3d at 170 (Luttig, J., concurring) ("[T]here is no basis whatever for concluding that Congress intended drug quantity . . . in 21 U.S.C. § 841 to be elements of the statutory offense.").

In addition to § 841's text, external factors demonstrate congressional intent to treat drug quantity as a sentencing factor for judges to decide. Before the Supreme Court decided *Jones*, every court that examined § 841 concluded that the factors that subsection (b) lists are merely sentencing factors for judicial determination. See, *e.g.*, *Promise*, 255 F.3d at 175 (Luttig, J., concurring) (collecting cases). Indeed, even after *Jones*, "which raised the spectre of a constitutional limitation on the legislative power to define offenses, and thus would have prompted a more searching, cautious statutory interpretation, every single court *still* held that Congress intended the facts in section 841(b) to be sentencing factors." *Id.* at 176 (collecting cases) (emphasis in original). Congress's inaction in the face of this long history of uniform judicial interpretation suggests congressional agreement that drug quantity is a sentencing factor for judicial determination. See *United States v. Kelly*, 105 F. Supp.2d 1107, 1115 (S.D. Cal. 2000).

Section 841's legislative history further bolsters the interpretation of subsection (b) as containing judge-determined sentencing factors. Particularly telling is the House Report, which states: "The foregoing sentencing procedures give maximum flexibility *to judges*, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." H.R. Rep. No. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4576 (emphasis added). See also H.R. Rep. No. 101-681(I), at 110 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6515 (noting the

need for judges to have "flexibility when fashioning a sentence" under § 841(b)).

Thus, the reasoning of courts holding that §§ 841 and 846 remain constitutional after *Apprendi* conflicts with basic tools of statutory construction embraced by this Court. And given the sheer number of defendants sentenced under §§ 841 and 846, it is extremely problematic that defendants continue to be incarcerated under statutes that four Justices of this Court believe to be of dubious constitutionality.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 01-2826 & 01-2827

JEFFREY P. CURTIS AND MARTIN A. SAX,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Central District of Illinois.
Nos. 01-4051 & 01-4053-**Joe Billy McDade**, *Chief Judge.*

ARGUED MAY 16, 2002-DECIDED JUNE 19, 2002

Before EASTERBROOK, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Convicted of conspiring to distribute marijuana, Jeffrey Curtis and Martin Sax were sentenced to 262-months' imprisonment apiece. See

United States v. Curtis, 37 F.3d 301 (7th Cir. 1994); *United States v. Sax*, 39 F.3d 1380 (7th Cir. 1994) (remanding for resentencing; the 262-month term was imposed on remand). After the Supreme Court issued *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Curtis and Sax filed collateral attacks under 28 U.S.C. §2255, contending that their sentences are unconstitutional because the petit jury did not find beyond a reasonable doubt that they conspired to distribute the minimum quantity (100 kilograms) that would support a sentence exceeding 240 months' imprisonment. See 21 U.S.C. §841(b)(1)(B)(vii). When imposing sentence the district judge found that the conspirators distributed more than 1,000 kilograms of marijuana, an order of magnitude larger than the statutory threshold, but *Apprendi* establishes that this decision was made by the wrong body (the court) and under the wrong burden of persuasion (a preponderance of the evidence).

Relying on the one-year statute of limitations added to §2255 ¶6 in 1996, the district court dismissed the petitions as untimely. The court recognized that a fresh year is available to take advantage of a "right . . . initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" (§2255 ¶6(3)) but concluded that this applies only if the Supreme Court itself has declared its new decision to be retroactive–and that Court has not deemed *Apprendi* retroactive. Shortly after the district court dismissed these petitions, we held in *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001), that for *initial* collateral attacks (such as these) a court of appeals or district court may make the retroactivity decision. A motions panel then issued certificates of appealability and directed the parties to brief the question whether *Apprendi* should be applied retroactively. If yes, then the petitions are timely; if no, then they are untimely.

To date, five courts of appeals have held that *Apprendi* is not retroactive on collateral review. See *In re Turner*, 267 F.3d 225 (3d Cir. 2001); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001). No court of appeals has held otherwise. We agree with these holdings and preserve the appellate unanimity.

Curtis and Sax offer two principal arguments why, in their view, *Apprendi* should be applied retroactively on collateral attack under the principles of *Teague v. Lane*, 489 U.S. 288 (1989). (There was no majority opinion in *Teague*, but the Court has treated Justice O'Connor's plurality opinion as the holding. See, e.g., *Tyler v. Cain*, 533 U.S. 656 (2001).) One is that *Apprendi* made a substantive change in the law and hence automatically applies even to closed cases. See *Bousley v. United States*, 523 U.S. 614, 619-21 (1998); *Davis v. United States*, 417 U.S. 333 (1974). The other is that *Apprendi* is a "watershed" rule that "requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty"'" (*Teague*, 489 U.S. at 307, quoting from *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring), quoting from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). See also *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

Bousley and *Davis* hold that a person convicted of an act that the law does not make criminal may obtain collateral relief. *Bousley* adds that *Teague's* retroactivity standard applies only to changes in procedural rules. Curtis and Sax contend that *Apprendi* is substantive rather than procedural. Yet *Apprendi* is about nothing but procedure—who decides a given question (judge versus jury) and under what standard (preponderance

versus reasonable doubt). *Apprendi* does not alter which facts have what legal significance, let alone suggest that conspiring to distribute marijuana is no longer a federal crime unless the jury finds that some particular quantity has been sold. Cf. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). Although some courts of appeals held in the wake of *Apprendi* that a district court lacks jurisdiction unless the indictment charges the quantity of drugs that authorizes an enhanced penalty–and this view was the mainstay of the dissenting opinions in *Moss* and *McCoy* calling for *Apprendi*'s retroactive application–the Supreme Court rejected that position in *United States v. Cotton*, 122 S. Ct. 1781 (2002). Just as we had held in *United States v. Bjorkman*, 270 F.3d 482, 489-92 (7th Cir. 2001), the Supreme Court concluded that the conviction remains valid although the indictment omits, and the jury does not find, facts that raise the maximum penalty. *Cotton* also concluded that the sentence can be valid, despite this error, even when the issue is raised on direct appeal. Because *Apprendi* is concerned with the identity of the decisionmaker, and the quantum of evidence required for a sentence, rather than with what primary conduct is unlawful, it identifies a new rule of criminal procedure that falls within the set of legal changes to which the *Teague* standard applies.

Thus we must ask whether the rights identified in *Apprendi* are so fundamental that any system of ordered liberty is obliged to include them. The Supreme Court considered a related argument in *Cotton*, where the defendant insisted that failing to name the drug quantity in the indictment and obtain a resolution (beyond a reasonable doubt) by the jury is so vital that is should be deemed a "structural error" that always leads to reversal on direct appeal. The Court's answer was that even if the error is "structural" and even if the point is raised on direct appeal, the error may not necessarily justify reversal

under the plain-error standard that applies to litigants who did not present their argument to the district court. Whether it does (assuming that (1) there is an error, (2) that is "plain," and (3) affects substantial rights) will depend on the evidence in the particular case. That is to say, *Cotton* held that a decision about drug quantity made by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that necessarily undermines the fairness, integrity, or public reputation of judicial proceedings. To the contrary, the Court continued,

> the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments. The real threat then to the "fairness, integrity, and public reputation of judicial proceedings" would be if [criminal defendants], despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.

122 S. Ct. at 1787. This observation is no less applicable to collateral attacks. So no bedrock rule of procedure has been broken. Finding by federal district judges are adequate to make reliable decisions about punishment. See *Edwards v. United States*, 523 U.S. 511 (1998). *Apprendi* therefore does not disturb sentences that became final before June 26, 2000, the date of its release.

AFFIRMED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JEFFREY P. CURTIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 01-4051
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	

ORDER

Before the court is Jeffery Curtis' Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. For the reasons that follow, Curtis' Petition is without merit and is dismissed as time-barred.

BACKGROUND

In October 1993, following a jury trial in the Central District of Illinois, Rock Island Division, Petitioner was convicted of conspiracy to distribute marijuana but was acquitted of a companion charge of money laundering. This Court sentenced Petitioner to 262 months imprisonment. Petitioner appealed. However, the Seventh Circuit affirmed his conviction and sentence on September 29, 1994. See United States v. Curtis, 37 F.3d 301 (7th Cir. 1994). Thereafter, Petitioner filed a writ of certiorari in the United States Supreme Court. The Court denied his writ on February 21, 1995. See Curtis v. United States, 513 U.S. 1154 (1995). On June 15,

2001, Curtis filed the instant writ of habeas corpus pursuant to 28 U.S.C. § 2255, raising various claims which he alleges entitle him to relief. This Order follows.

ANALYSIS

The issue here is whether Curtis's Petition was filed within the one-year statute of limitations as set forth by 28 U.S.C. § 2255. In pertinent part, that section states:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -
>
> (1) the date on which the judgment of conviction becomes final;
>
> . . .
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

28 U.S. C. § 2255.

Here, Petitioner's conviction became final no later than February 21, 1995 (the date upon which the United States Supreme Court denied his writ of certiorari). See Gendron v. United States, 154 F.3d 672,674 (7th Cir. 1998). Thus, Curtis had to file his § 2255 petition by February 22, 1996, unless the period of limitations was tolled under § 2255. Curtis filed the instant petition on June 15, 2001, well after the statute of

limitations expired. Therefore, if the statute of limitations was not tolled, Curtis' petition is time-barred.

Petitioner contends that he satisfies the one-year limitations period under § 2255 pursuant to the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Specifically, he argues that the Supreme Court has given him newly recognized rights which it made retroactively applicable to cases on collateral review.

The Court disagrees. Even assuming Petitioner can show an Apprendi violation occurred, the Seventh Circuit has found that the United States Supreme Court has not held that Apprendi is retroactively applicable to cases on collateral review. See Talbott v. Indiana, 226 F.3d 866 (7th Cir. 2000) (warning prisoners to reconsider bringing initial collateral attacks based on Apprendi). Although Petitioner disagrees with Talbot, this Court must follow the law as set forth by the Seventh Circuit Court of Appeals. Additionally, virtually all other Circuits that have ruled on the issue agree. See Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000); Jones v. M.D.L. Smith, 231 F.3d 1227, 1238 (9th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000); Browning v. United States, __ F.3d __, 2001 WL 202041, at *4-5 (10th Cir. Mar. 1, 2001); In re Joshua, 224 F.3d 1281, 1282-83 (11th Cir. 2000). Accordingly, Curtis' petition is time-barred.

CONCLUSION

IT IS THEREFORE ORDERED Curtis' Petition Under 28 §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is DISMISSED.

CASE TERMINATED.

Entered this 22nd day of June, 2001.

_____[s]_____
JOE BILLY McDADE
Chief United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

MARTIN A. SAX,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 01-4053
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	

ORDER

Before the Court is Martin Sax's Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. For the reasons that follow, Sax's Petition is without merit and is dismissed as time-barred.

BACKGROUND

In October 1995, following a jury trial in the Central District of Illinois, Rock Island Division, Petitioner was convicted of conspiracy to distribute marijuana and money laundering. This Court sentenced Petitioner to 210 months imprisonment. Petitioner appealed. The Seventh Circuit affirmed his convictions but remanded for resentencing. See United States v. Sax, 39 F.3d 1380 (7th Cir. 1994). Upon remand, this Court resentenced Sax to 262 months imprisonment. It appears from the record that Sax failed to appeal his second sentence and did not seek a writ of certiorari in the United States Supreme Court. On June 20, 2001, Sax

filed the instant writ of habeas corpus pursuant to 28 U.S.C. § 2255, raising various claims which he alleges entitle him to relief. This Order follows.

ANALYSIS

The issue here is whether Sax's Petition was filed within the one-year statute of limitations as set forth by 28 U.S.C. § 2255. In pertinent part, that section states:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -
>
> (1) the date on which the judgment of conviction becomes final;
>
> . . .
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

28 U.S. C. § 2255.

Here, Petitioner's conviction became final no later than March 27, 1995 (the last day on which he could have appealed this Court's second sentence to the Seventh Circuit Court of Appeals). See Fed. R. App. P. 4(b)(1)(A). Thus, Sax had to file his § 2255 petition by March 28, 1996, unless the period of limitations was tolled under § 2255. Sax filed the instant petition on June 20, 2001, well after the statute of limitation

expired. Therefore, if the statute of limitation was not tolled, his petition is time-barred.

Petitioner contends that he satisfies the one-year limitations period under § 2255(3) pursuant to the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Specifically, he argues that the Supreme Court has given him newly recognized rights which it made retroactively applicable to cases on collateral review.

The Court disagrees. Even assuming Petitioner can show an Apprendi violation occurred, the Seventh Circuit has found that the United States Supreme Court has not held that Apprendi is retroactively applicable to cases on collateral review. See Talbott v. Indiana, 226 F.3d 866 (7th Cir. 2000) (warning prisoners to reconsider bringing initial collateral attacks based on Apprendi). Although Petitioner disagrees with Talbot, this Court must follow the law as set forth by the Seventh Circuit Court of Appeals. Additionally, virtually all other Circuits that have ruled on the issue agree. See Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000); Jones v. M.D.L. Smith, 231 F.3d 1227, 1238 (9th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000); Browning v. United States, __ F.3d __, 2001 WL 202041, at *4-5 (10th Cir. Mar. 1, 2001); In re Joshua, 224 F.3d 1281, 1282-83 (11th Cir. 2000). Accordingly, Sax's petition is time-barred.

CONCLUSION

IT IS THEREFORE ORDERED Sax's Petition Under 28 U.S. C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is DISMISSED.

CASE TERMINATED.

Entered this 22nd day of June, 2001.

_____[s]_____
JOE BILLY McDADE
Chief United States District Judge

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 93-3063, 93-3288.

UNITED STATES of AMERICA,

Plaintiff-Appellee, Cross-Appellant,

v.

MARTIN A. "MARTY" SAX,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
Joe Billy McDade, *District Judge.*

Argued June 8, 1994-Decided Nov. 7, 1994

Rehearing and Suggestion for Rehearing En Banc Denied
Jan. 6, 1995

Before ALARCON,* RIPPLE and MANION, *Circuit Judges.*

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* Hon. Arthur L. Alarcon, of the Ninth Circuit, sitting by designation.

MANION, *Circuit Judge*. An undercover drug investigation named "Operation Adobe" targeted the distribution of large quantities of marijuana coming out of Tucson, Arizona for delivery and distribution into the Quad Cities areas of Illinois. As a result of the investigation, defendant Marty Sax was indicted along with several others. Following a jury trial, Sax was convicted of one count of conspiracy to distribute marijuana, in violation of 21 U.S.C. §§ 846 and 841, and two counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). The district court sentenced Sax to 210 months in prison. Sax appeals his convictions; the government, in a cross-appeal, challenges the district court's refusal to apply a four-level upward adjustment under U.S.S.G. § 3B1.1(a) for Sax's role in the offense, as well as its refusal to give Sax a two-level upward adjustment under U.S.S.G. § 3C1.1 for obstruction of justice. We affirm Sax's convictions and remand to the district court for resentencing.

I. Background

In the early 1980's Marty Sax started a large-scale marijuana distribution ring that was based out of Tucson, Arizona and reached into Illinois. In September of 1982, Sax recruited Michael Cutkomp to distribute Sax's marijuana in the Quad Cities area[1] of Illinois. Soon thereafter, Cutkomp began receiving from Sax one-pound shipments of marijuana in the mail. Cutkomp would break these shipments into smaller amounts which he in turn would parcel out to his own

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[1] The "Quad Cities" refers to an area in northwest Illinois and eastern Iowa which includes the cities of Rock Island and Moline in Illinois, and the cities of Davenport and Bettendorf in Iowa.

distributors, including Dan Burkhead, Anthony Carmack and later, Dan's brother, Scot Burkhead, and Danny Brown. Cutkomp would front the marijuana to his distributors, who would repay him out their resales. Cutkomp would then use these proceeds to purchase more marijuana from Sax.

The methods of delivery changed as Cutkomp began purchasing larger quantities of marijuana. At the outset, Cutkomp would fly to Arizona, taking with him several empty suitcases. Once he arrived, he would call Sax who would meet Cutkomp at his hotel, take his suitcases and return them filled with marijuana; Cutkomp, with the marijuana-filled suitcases, would then fly back to Illinois where the shipment was broken down and parceled out to Cutkomp's distributors. By late 1983, Cutkomp started purchasing Sax's marijuana in one-hundred-pound increments. To accommodate these larger shipments, Sax recruited several drivers, including William Wainwright and Tom O'Donnell, to drive the marijuana from Arizona to Illinois. They would drive to a house owned by Sax named the "Cactus Ranch," located on the east side of Tucson, in which large quantities of marijuana were stored. Once there, the drivers would load up the vehicles with marijuana and drive to Illinois where the shipment would be delivered pursuant to Cutkomp's instructions.

In 1985 Cutkomp and his wife Karin (who was also involved in her husband's marijuana business) moved to Tucson. From there the Cutkomps continued distributing marijuana into Illinois using various drivers, including Cutkomp himself, his mother-in-law, Rosina Jech, and Danny Brown's brother, William Brown. Once the shipments arrived in Illinois they would be delivered to Danny Brown and then to Scot Burkhead. At other times, only part of the

shipment would be delivered to Brown and Burkhead; the rest would be driven to Chicago where it was delivered to Joe Cullinane, who, according to Burkhead's testimony, was another one of Cutkomp's distributors.

Meanwhile, Sax had been mentioning to several people that he no longer wanted to be personally involved in the distribution side of the marijuana business. To that end, sometime in late 1984 or early 1985, Sax recruited Ted Eichorn to begin filling orders for Sax's distributors. The record shows that sometime in 1985, Sax sold his distribution business to Ted Eichorn. The price was $50,000, which was to be paid out of Eichorn's future sales. Until Eichorn paid off the balance, Sax retained the right to take back his business.

Eichorn managed things fairly well at first. He filled Cutkomp's orders just as Sax had done. He also filled orders from Joe Cullinane, who, in addition to selling for Cutkomp, had been placing his own orders with Sax. Eichorn even managed to expand Sax's existing operations. Wainwright, one of Sax's drivers, started placing his own orders with Eichorn. At Wainwright's suggestion, Eichorn fronted marijuana to Wainwright's friend, John Heller, who would distribute marijuana in Illinois. For getting Heller started, Eichorn agreed to pay Wainwright a kickback of Heller's sales.

Eichorn, however, was a heroin addict, and soon became an unreliable supplier. He would frequently refuse to answer his customers' pager calls. At other times, he would simply engage in bizarre behavior which demonstrated his unreliability. Sax's former customers expressed their frustrations to Sax. In late 1985, Cutkomp and Cullinane met

with Sax in a Tucson hotel to complain about Eichorn. Following a heated discussion with Cutkomp and Cullinane, Sax apparently got Eichorn back in line, for the record indicates that Eichorn resumed supplying Cutkomp and Cullinane with marijuana. It was not long, however, before Eichorn's distribution process fell into disarray. So in late 1986, Cutkomp and Cullinane, fed up with Eichorn's antics, stopped purchasing marijuana from Eichorn and began purchasing their marijuana from Jeff Curtis, another marijuana distributor living in Tucson.[2]

This was not the end of Sax's involvement with his distributors, however. Even before he turned things over to Eichorn, Sax, who was also a realtor, had been involved in setting up real estate investments into which his distributors could deposit their drug proceeds. For instance, in 1985, Sax introduced Eichorn to Joel Abrams, a Tucson realtor, so that Eichorn could purchase 10 acres of real estate. Abrams, who at the time was unaware of Sax's and Eichorn's drug activities, thought it unusual when Eichorn reached into his attache case and pulled out $10,000 in cash as his down payment. Later, Sax began soliciting his distributors to invest money in various limited partnerships that Sax and Abrams had formed to purchase real estate in and around Tucson. In December of 1985, Sax and Abrams set up Corona Northwest Associates I ("CNA I"), a real estate limited partnership in which Sax and Abrams were the general partners. Sax provided nearly half of the limited partners in CNA I through soliciting investments from his various distributors, most notably Cutkomp and Wainwright. In December of 1985, Wainwright subscribed to two shares in CNA I; at that time,

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[2] For all of his failings Eichorn apparently left the scene at the right time. The record indicates that he has evaded prosecution and remains a fugitive.

he informed Sax and Abrams that he was purchasing one of these shares for Eichorn. Also in December of 1985, Cutkomp subscribed to one share in CNA I, to be put in the name of his mother, Margaret Cutkomp. Cutkomp and Wainwright (on behalf of himself and Eichorn) continued making their annual limited partnership payments to CNA I, frequently in cash. In March or April of 1987, Sax and Abrams set up another real estate limited partnership, Corona Marana IV ("CM IV"), in which they were both general partners. Abrams needed investors so he turned to Sax who, in turn, solicited money from his former courier Tom O'Donnell. O'Donnell agreed and subscribed to one share. He would send his annual payments (many times in cash) to Sax who would then personally deliver them to Abrams. Finally, in the summer of 1987, Sax and Abrams set up another limited partnership, Corona Pinal Partners V ("CPP V"). Again, Sax provided several investors, including O'Donnell and John Heller.[3]

In 1988 the authorities began closing in on the distribution ring. In October of 1988, Illinois authorities executed a search at Scot Burkhead's home where they found marijuana and evidence that pointed to the Cutkomps. In February of 1989, the Cutkomps (who had moved back to Illinois in May of 1988), fled Illinois with nearly $300,000 in cash and headed for Mexico. On their way out of the country, the Cutkomps stopped off in Tucson and informed Sax of the Illinois investigation. They also, through a third party, gave Sax $4,125 in cash as their annual contribution to CNA I. Sax, in turn, handed this cash over to Abrams on or about

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[3] Although the limited partnership only referred to the investor as "Heller," the record indicates that the investor's subscription form was signed by John Heller.

February 17, 1989. Abrams' wife, Cheryl, who did the bookkeeping for the limited partnerships, deposited Cutkomp's cash into CNA I on or about April 28, 1989.

On April 20, 1989, Captain Richard Fisher of the Rock Island, Illinois Sheriff's Department, along with Special Agent Moore of the Internal Revenue Service (both of whom were involved in Operation Adobe) came to Tucson to question Sax about his involvement in the Quad Cities marijuana distribution ring. During that interview, the agents informed Sax that they had information linking him to Cutkomp. Sax denied being involved in Cutkomp's drug activities. He also denied receiving drug monies and investing them in any of the limited partnerships. Sax told Fisher and Agent Moore that although Cutkomp was listed as a limited partner in CNA I, the money received was actually that of Cutkomp's mother. Fisher and Agent Moore then served a subpoena on Sax requiring him to bring any records of his transactions with Cutkomp to the grand jury. After the authorities left, Sax, that same day, went to see Abrams. When he arrived, Sax informed Abrams that he (Sax) and Cutkomp were being investigated for drug activities, and asked Abrams to hand over all the investment records for the limited partnerships. Abrams initially refused, but later agreed to give Sax the record of Cutkomp's investments into CNA I.

On May 7, 1992, a federal grand jury in Peoria, Illinois indicted Sax, Eichorn, O'Donnell, and Curtis with one count of conspiring between themselves and others, including Mike Cutkomp, to knowingly conspire to distribute over 1,000 kilograms of marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1). The indictment charged that, as part of the conspiracy, Sax and others "would and did transmit and

cause to be transmitted a portion of these drug proceeds to others for the purposes of laundering those drug proceeds to conceal the nature and source of the drug proceeds." On September 9, 1992, the grand jury issued a superseding indictment, in which they additionally charged Sax with two counts of money laundering, one on or about February 12, 1988, the other on or about March 25, 1988, both in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 2. Many of the codefendants pleaded guilty; Sax pleaded not guilty and proceeded to trial. Following a ten-day jury trial, Sax was convicted as charged.

At sentencing, the district court calculated Sax's base offense level at 37. This, in conjunction with Sax's Criminal History Category of I, gave Sax a Guidelines sentencing range between 210 and 262 months. The government requested that the district court impose a four-level adjustment under U.S.S.G. § 3B1.1(a) based on Sax's role in the offense, and a two- level upward adjustment under U.S.S.G. § 3C1.1 based on Sax's attempts to obstruct justice. The district court denied the government's requests, giving only a three-level increase under § 3B1.1(b), and sentenced Sax to 210 months in prison.

Sax raises a host of issues in this appeal but only a few deserve any extended discussion. These include a challenge to the sufficiency of the evidence supporting Sax's conspiracy conviction, a claim that Sax's prosecution for conspiracy was barred by the applicable statute of limitations, and a challenge to the jury instructions on money laundering. The government cross-appeals, claiming that the district court erred in denying the additional upward adjustments to Sax's sentence.

II.

A. Sufficiency of the Evidence

Sax claims that the district court erred in denying his motion for judgment of acquittal under Fed.R.Crim.P. 29(c), claiming that there was insufficient evidence to support his conspiracy conviction. He maintains that the government failed to prove a conspiracy among Sax and the other defendants; instead, he claims that the government's evidence, at best, demonstrates a buyer-seller relationship between Sax and the various defendants, which, by itself, is not enough to establish the existence of a conspiracy.

The proper standard of review of a district court's denial of a judgment of acquittal, pursuant to Fed.R.Crim.P. 29(c), is de novo. *See United States v. Castaneda-Cantu*, 20 F.3d 1325, 1330 (5th Cir. 1994). This simply requires that we review the defendant's motion by the same standard applied by the district court, which means that the motion to acquit should be granted if "the evidence is insufficient to sustain a conviction." 2 Charles A. Wright, Federal Rules of Criminal Procedure § 467 at 655 (1982). And our standard for reviewing the sufficiency of the evidence is certainly well-settled: "We review the evidence and all the reasonable inferences in the light most favorable to the government, and will reverse a conviction only if no rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt." *United States v. Zarnes*, 33 F.3d 1454, 1465 (7th Cir. 1994). In evaluating the evidence underlying a conspiracy conviction, we are not limited to direct evidence; circumstantial evidence will do. *Id.*

"'A criminal conspiracy is an agreement to commit a crime.'" *Zarnes*, at 1465 (quoting *United States v. Lechuga*,

994 F.2d 346, 348 (7th Cir.) (en banc), *cert. denied*, 510 U.S. 982 (1993)). "To obtain a criminal conviction for conspiracy under § 846, the government must establish the existence of an agreement between two or more individuals, with the intent to commit an offense in violation of the Controlled Substance Act." *United States v. Sanders*, 32 F.3d 299, 302 (7th Cir. 1994). Once the existence of a conspiracy has been established, the government may connect a defendant to the conspiracy if there is substantial evidence that the defendant both knew of the conspiratorial agreement and intended to join its criminal purpose. *See Zarnes*, 33 F.3d at 1465.

To be sure, "[a] buyer-seller relationship, standing alone, does not establish the existence of a conspiracy." *Zarnes*, 33 F.3d at 1465. What is necessary is "'proof of an agreement to commit a crime other than the crime that consists of the sale itself.'" *Id.* (quoting *Lechuga*, 994 F.2d at 347). This means that "there must be facts in evidence in addition to a sale for resale from which proof of a conspiracy to distribute can be inferred." *United States v. Baker*, 1 F.3d 596, 597 (7th Cir.), *cert. denied*, 510 U.S. 956 (1993). This evidence can include transactions involving large quantities of drugs, prolonged cooperation between the parties, and sales on a credit, or "front," basis. See *Zarnes*, 33 F.3d at 1465.

Several of these factors are clear from the record. Karin Cutkomp testified, for example, that Sax came to her home in Illinois to solicit her husband's help in distributing Sax's marijuana into the Quad Cities. Cutkomp agreed to do so. This alone shows that the parties contemplated more than a mere buy-sell arrangement. But there is more. Sax soon began sending Cutkomp shipments of marijuana weighing well over 100 pounds. At one point in the conspiracy,

Cutkomp was receiving two such shipments per month. Sax also made similar large shipments to Joe Cullinane. In arranging for these large-scale shipments, Sax, Cutkomp and Cullinane had worked out a standardized method of delivery; Sax would arrange for his own drivers to deliver hundreds of pounds of marijuana by truck, one portion to be dropped off with Cutkomp and his distribution minions, the rest to go on to Chicago to be delivered to Cullinane. This too is evidence pointing beyond a buy-sell arrangement. *See, e.g., Zarnes*, 33 F.3d at 1465 (stating that evidence to show agreement to commit a crime other than the sale itself can include "transactions in which the parties have standardized their dealing with one another."). Sax conducted business in this manner with Cutkomp and Cullinane for over two years. There is more, but from this alone the jury could reasonably conclude that Sax, Cutkomp and Cullinane were involved in a full- blown conspiracy to distribute marijuana. We reject Sax's contentions to the contrary.[4]

B. Withdrawal From the Conspiracy

Sax's main defense at trial was that he had withdrawn from the conspiracy more than five years before the original indictment was filed. He correctly observes that according to

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[4] Sax makes a passing challenge to the district court's conspiracy instruction. He complains that the instruction told the jury that it had to find that Sax had committed an overt act in furtherance of the conspiracy, even though there is no overt act requirement under 21 U.S.C. § 846. *See United States v. Sassi*, 966 F.2d 283, 285 (7th Cir.), *cert. denied*, 506 U.S. 991 (1992). But the fact that the government has imposed an additional burden upon itself is not grounds for reversal. *See United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991). Moreover, as we shall see later on in the opinion, charging Sax with acts in furtherance of this conspiracy put him on notice that the government could invoke the *Pinkerton* doctrine in seeking to establish Sax's guilt on the other counts charged in the indictment.

18 U.S.C. § 3282, a prosecution for conspiracy is governed by a five-year statute of limitations. This means that the government in a criminal conspiracy prosecution must demonstrate that a conspiracy existed and that "the defendant was a member of the conspiracy at some point in the five years preceding the indictment." *United States v. Read*, 658 F.2d 1225, 1232 (7th Cir. 1981). The original indictment was issued in this case on May 7, 1992. Therefore, the government was required to prove that Sax was still a member of the conspiracy after May 7, 1987. Sax vigorously maintains that he was not. He claims that he had withdrawn from the conspiracy no later than late 1986, when Cutkomp and Cullinane ceased purchasing marijuana from Sax's successor-in-interest, Ted Eichorn. This, coupled with the government's failure to put on any evidence that Sax committed any acts in furtherance of the conspiracy within the five-year period preceding the government's original indictment of May 7, 1992, forms the basis for Sax's claim that this prosecution was barred by the statute of limitations.

First, some general principles. Withdrawal from a conspiracy is easier to state than achieve. Withdrawal requires an affirmative act on the part of the conspirator; he must either make a full confession to the authorities, or communicate to each of his coconspirators that he has abandoned the conspiracy and its goals. *See United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993); *accord United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). "'Merely ceasing participation in the conspiracy, *even for extended periods of time*, is not enough' to evidence withdrawal." *DePriest*, 6 F.3d at 1206 (quoting *United States v. Bafia*, 949 F.2d 1465, 1477 (7th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1989 (1992)) (emphasis added). Instead, the conspirator must take

affirmative steps to defeat or disavow the conspiracy's purpose. See *Read*, 658 F.2d at 1234. Until he does, he is presumed to continue in the conspiracy. See *DePriest*, 6 F.3d at 1206; Read, 658 F.2d at 1234.

At the close of the evidence, the district court heard arguments by both parties regarding Sax's Rule 29(b) motion for acquittal, in which he claimed, among other things, that he had withdrawn from the conspiracy more than five years before the filing of the original indictment. Following argument on Sax's motion, and after denying Sax's motion for acquittal on the two counts of money laundering, the district court issued the following ruling:

> The conspiracy charge is much easier for the Court, it didn't have any difficulty denying those motions for acquittal. I think there were acts, money laundering acts, of Mr. Sax subsequent to May 7, 1987. I think there's a question of whether or not his withdrawal was complete and in good faith. There was [sic] certain people he didn't tell. You certainly would expect him to have told Cullinane or O'Donnell. You would certainly think that the money laundering activities were inconsistent with his withdrawal. ***If the defendant is withdrawing from drug transactions, seems to me I sure as hell wouldn't be taking money or facilitating money from drug dealers. That's inconsistent with a claim that he's withdrawing***, and other contacts that--and connections and events that the defendant Sax had with drug dealers subsequent to the claimed withdrawal, so the Court would deny the motion to acquit on the conspiracy charge, also.

(Emphasis added.)

We agree. To accept Sax's argument that he had withdrawn from this conspiracy at the moment he sold his business to Eichorn would turn the doctrine of withdrawal on its head. Sax's sale can hardly be characterized as "'*some act to disavow or defeat the purpose* [of the conspiracy].'" *Read*, 658 F.2d at 1234 (quoting *Hyde v. United States*, 225 U.S. 347, 369 (1912)) (emphasis in original). On the contrary, the evidence demonstrates that Sax continued to wholeheartedly endorse the purpose of the marijuana conspiracy--making profits from drug sales--by passing it along to Eichorn. Payment to Sax for the business was contingent on future drug sales. What is more, even before Sax sold his interest to Eichorn, he had been busy setting up legitimate investment opportunities for his fellow coconspirators through which they could clean up their drug monies. And, following the sale of his business, Sax stepped up his role as financial manager, knowing full well that the money he was receiving was the proceeds of drug sales. This was of great benefit to them, *cf. United States v. Tarantino*, 846 F.2d 1384, 1396-97 (D.C. Cir. 1987), *cert. denied*, 488 U.S. 867 (1988) ("money launderers play an essential part in a [§ 846] conspiracy") and, as a general partner in the several limited partnerships which received these investments, it was also another way for Sax to continue enjoying the fruits of the ongoing conspiracy. In other words, Sax simply sold the marketing and distribution end of the business, and then redirected his efforts towards the investment side of the conspiracy. As we have previously stated, "the law will not let you wash your hands of a dangerous scheme *you have set in motion and that can continue to operate and cause great harm without your continued participation.*" *Patel*, 879 F.2d at 294 (emphasis added). Where the defendant merely changes roles in the very same conspiracy that he himself had previously set in motion, his hands remain soiled. The district court and, later, the jury,

were quite correct in concluding that there was ample evidence showing that Sax had not disavowed or renounced the purpose of the marijuana conspiracy, which means that the government's prosecution was not barred by the statute of limitations.

Sax also contends that the district court's withdrawal instruction is flawed because it does not clearly tell the jury that they must acquit the defendant if they had reasonable doubts concerning his continued membership in the conspiracy. The transcript of the instructions conference reveals that Sax's counsel raised no such objection, which means that we review his challenge for plain error. *See United States v. McKenzie*, 922 F.2d 1323, 1330 n. 4 (7th Cir.), *cert. denied*, 502 U.S. 854 (1991). There is no plain error. The instruction told the jury that

> Merely ceasing participation in the conspiracy standing alone even for extended periods is not withdrawal. In order to withdraw, Marty Sax must have taken some affirmative act to terminate his effort to promote or facilitate the conspiracy by doing an affirmative act inconsistent with the object of the conspiracy where such act is communicated in a manner reasonably calculated to reach coconspirators. Marty Sax cannot be found guilty of the conspiracy charge if he withdrew from the conspiracy more than five years before the indictment was returned. In other words, he had to withdraw before any act committed within the statute of limitations period. Acts not alleged in the indictment may be proved to show his participation in the conspiracy within the statute of limitations. The indictment in this case was returned on May 7, 1992. Thus, the government must prove beyond a reasonable doubt that Marty Sax did not withdraw from the conspiracy prior to May 7, 1987.

This instruction comports with the law of this circuit. It made it clear to the jury that Sax bore the burden of going forward with evidence of withdrawal. It also informed them that once Sax goes forward with such evidence, the government bears the burden of disproving Sax's withdrawal beyond a reasonable doubt. That is all our precedent requires. *See Read*, 658 F.2d at 1236.

C. Money Laundering Under 18 U.S.C. § 1956(a)(1)(B)(9)

Sax raises a host of issues and subissues related to this aspect of his conviction, but we consider only those aimed at the jury instructions. In evaluating Sax's claims, we will "review the instructions as a whole, and '[a]s long as the instructions treat the issues fairly and adequately, they will not be interfered with on appeal.'" *United States v. Ruiz*, 932 F.2d 1174, 1179 (7th Cir.), *cert. denied*, 502 U.S. 849 (1991) (quoting *United States v. McNeese*, 901 F.2d 585, 607 (7th Cir. 1990)).

At the instructions conference, Sax's attorney directed most of his efforts against the government's aiding and abetting instruction given by the court: "Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself with the criminal venture, participate in it, and try to make it succeed." In support of this instruction the government argued that Sax had knowingly aided Cutkomp, as well as Eichorn (acting through Wainwright), in investing their drug proceeds into CNA I, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). This, according to the government, made him punishable as a principal under 18 U.S.C. § 2(a); hence

the instruction. In response, Sax argued that there was no evidence of record that could justify the instruction as a basis for liability under counts three and four of the superseding indictment. Count three relates to Cutkomp's annual deposit of $4,125 into CNA I on February 12, 1988. Abrams testified that he probably received that payment by mail, as he had no recollection that it had been delivered to him by Sax. Count four relates to an annual payment into CNA I that Wainwright, acting for Eichorn, personally made to Abrams in March of 1988. Sax's attorney argued to the district court that since Sax was not in any way personally connected to either of these CNA I payments, the evidence did not support the government's aiding and abetting instruction. The district court took Sax's objections under advisement and promised a ruling the following day.

The next day, before resuming discussion on the disputed instruction, the district court heard argument on Sax's pending Rule 29(b) motion for acquittal. In responding to this motion, particularly those portions seeking acquittal of the money laundering counts, the government argued that Sax could be held liable for both counts of money laundering under the doctrine of coconspirator liability set forth in *Pinkerton v. United States*, 328 U.S. 640 (1946). Under the *Pinkerton* theory, a defendant who is involved in a criminal conspiracy can be held liable for the criminal acts of his coconspirators if such acts are in furtherance of or are a natural consequence of the conspiracy. *See United States v. Manzella*, 791 F.2d 1263, 1267 (7th Cir.1986). Sax objected, claiming that he had not been notified that the government would rely on *Pinkerton* as a basis for establishing Sax's liability for money laundering. The district court, without commenting on the government's *Pinkerton* argument, denied Sax's motion for acquittal, and resumed its instruction

conference. The district court gave the jury both an aiding and abetting instruction, as well as a pattern *Pinkerton* instruction.[5] The jury found Sax guilty.

Sax renews his challenge to the district court's aiding and abetting and *Pinkerton* instructions. However, we will address only the latter. This is because, given the open and shut case against Sax regarding his continued involvement in this conspiracy, if a *Pinkerton* instruction was appropriate, then this eliminates the need to address the majority of his other challenges to his money laundering convictions.[6]

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[5] The district court gave the following *Pinkerton* instruction:

> A conspirator is responsible for offenses committed by his fellow conspirator if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of or as a natural consequence of the conspiracy.
>
> Therefore, if you find a defendant guilty of the conspiracy as charged in Count 1 and if you find beyond a reasonable doubt that while he was a member of the conspiracy, his fellow conspirators committed the offenses in Counts 3 and 4 in furtherance of or as a natural consequence of that conspiracy, then you should find him guilty of Counts 3 and 4.

This instruction is identical to this Circuit's *Pinkerton* instruction. *See McKenzie*, 922 F.2d at 1330 n. 3.

[6] Sax also suggested, both in his Rule 29(c) motion and in his brief to this court, that the government failed to prove that any of the coconspirators' investments into the various limited partnerships were punishable as money laundering under 18 U.S.C. § 1956(a)(1)(B)(i). Sax claims that to obtain a conviction under this section, the government was required to prove that the defendant intended to, and did, conceal the identity of the source of the ill-gotten gain used in the particular financial transaction. Sax maintains that Abrams knew all along that Mike Cutkomp and Ted Eichorn were investing their monies into CNA I. This shows that there was no attempt to conceal the identities of the persons making the investments, which, according to Sax, demonstrates that none of the transactions listed in counts three and four of the indictment constituted money laundering under § 1956(a)(1)(B)(i). But

Sax's main complaint against this instruction, raised both below in his post-trial motion for acquittal under Rule 29(c) and in this court, is that it was given at all. Specifically, he claims that the government, by not invoking *Pinkerton* until the instruction stage, has engaged in unfair "bait and switch." In essence, Sax claims that he was unfairly surprised by the government's decision to invoke *Pinkerton* as an alternative basis for establishing criminal liability under counts three and four of the indictment.[7] In ruling on Sax's Rule 29(c) motion, the district court had this to say about Sax's claim of "surprise":

> The *Pinkerton* instruction was consistent with a viable theory of the government's case.... The government asked

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to accept such a deformed reading would vacate the statute. A plain reading of the provision referred to by Sax, subsection (B)(i), reveals that the element of concealing or disguising applies to "the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i) (emphasis added). Those things which can be concealed are listed in the disjunctive, which means that the "'money laundering statute is not aimed solely at commercial transactions intended to disguise the relationship of the item purchased with the person providing the proceeds; the statute is aimed broadly at transactions designed in whole or part to conceal or disguise in any manner the nature, source, ownership or control of the proceeds of unlawful activity.'" *Hollenback v. United States*, 987 F.2d 1272, 1278-79 (7th Cir. 1993) (quoting *United States v. Lovett*, 964 F.2d 1029, 1034 (10th Cir.), *cert. denied*, 506 U.S. 857 (1992)).

[7] Sax also offers a series of trifling contentions regarding the wording of the district court's *Pinkerton* instruction. None of these, however, were raised below, which means that in order for any of these alleged shortcomings to rise the level of reversible error, the error must be "plain." *See Ruiz*, 932 F.2d at 1181; *McKenzie*, 922 F.2d at 1330 n. 4. We are satisfied that nothing in the wording of the district court's *Pinkerton* instruction constituted error, plain or otherwise.

for a *Pinkerton* instruction only after the Court balked at the giving of an aiding and abetting instruction, and the Defendant had the opportunity to argue the issue. The underlying premise of the *Pinkerton* instruction is inherent in an Indictment alleging a conspiracy since it is horn book law that a co-conspirator is liable for overt acts committed by other members in furtherance of the conspiracy. Experienced trial counsel for Defendant was surely on notice as to this prospect; the surprise comes from the government's request for it during the conference on instruction. I see no reason why the government should be required to give Defendant advance notice of its trial strategy in this regard or be precluded from seeking an instruction consistent with the applicable law of conspiracy. Defendant is presumed to know the law.

This ruling is sound. *United States v. Galiffa*, 734 F.2d 306, 314 (7th Cir. 1984), makes it clear that the government does not have to fire a warning shot by including in the indictment every theory of law that it will employ in its attempt to convict the defendant. Indeed, "[w]hen one is charged with conspiracy, it is probable that he will also be charged with the substantive offenses committed by a co-conspirator because one who is found to be a part of the conspiracy may be liable for the substantive crimes springing from the conspiracy." *Galiffa*, 734 F.2d at 315. This is especially true where, as here, the indictment put Sax on clear notice of potential *Pinkerton* liability by alleging that Sax's coconspirators committed various acts of money laundering as part of and in furtherance of the conspiracy. Moreover, nowhere in his meandering brief does Sax bother to point out any prejudice resulting from the government's failure to tip its hand. In short, Sax cannot demonstrate that the district court committed reversible error in giving this instruction.

D. Venue

Sax's final argument is that there was no evidence placing venue for the money laundering offenses in the Central District of Illinois. "Venue is proper in any district where an 'offense was begun, continued, or completed.'" *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986) (quoting 18 U.S.C. § 3237(a)). Moreover, "proof of venue 'is not an essential fact constituting the offense charged ... and need only be proved by a preponderance of the evidence.'" *United States v. Hatchett*, 31 F.3d 1411, 1424 (1994) (quoting *United States v. McDonough*, 603 F.2d 19, 22 (7th Cir. 1979)); *accord United States v. Canino*, 949 F.2d 928, 942 (7th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). This "may include inferences drawn from circumstantial evidence." *Canino*, 949 F.2d at 942.

The government met its burden in this case. "Under section 3237(a) venue is proper in any district where any part of the money laundering scheme occurred." *United States v. Beddow*, 957 F.2d 1330, 1336 (6th Cir. 1992). Evidence shows that the funds used for the acts of money laundering alleged in count three of the indictment were the proceeds of Cutkomp's drug sales in the Central District of Illinois. This is sufficient to confer proper venue under § 3237(a). *See id.*

We reach the same conclusion as to venue for count four, but a few more facts are needed. The funds used in this transaction came from $50,000 in cash that Eichorn, sometime in late 1987, gave to Wainwright in Arizona with instructions to invest it in Wainwright's Illinois farming business. Wainwright invested approximately half of this as instructed; the remainder he used to pay bills and buy

groceries while living in Illinois. In March of 1988 Wainwright's and Eichorn's annual payment into CNA I came due. So Wainwright gathered up whatever was left of Eichorn's money and headed to Tucson, whereupon on March 21, 1988 he made a cash payment of $4,125 to Abrams, stating that this was Eichorn's annual payment into CNA I. Returning to the issue of venue, it is true that Eichorn gave this money to Wainwright while they were both living in Arizona. But that poses no obstacle to establishing venue in the Central District of Illinois, for these funds came from the drug sales of John Heller, whom Wainwright and Eichorn, as alluded to earlier in the opinion, had recruited in late 1986 to sell Eichorn's marijuana in Illinois.

Wainwright testified that he continued to make kickbacks off of Heller's sales up through mid-1988. And we think it more likely than not that Heller was making these drug sales in the Central District of Illinois. Wainwright testified that he grew up in the Quad Cities area of Illinois, which is in the Central District. When asked how he knew Heller, Wainwright stated that "[h]e was a friend of mine from back here in the Midwest." We take "here" to mean the Quad Cities area or, even the Peoria, Illinois area, where Sax's trial was being conducted. And so when Wainwright testified that Heller would take Eichorn's marijuana and sell it back in the Midwest, we think it more likely than not that Heller was bringing it back to sell either in the Quad Cities or Peoria, which means that it was being sold in the Central District of Illinois. As stated earlier, this is enough to place venue in the Central District of Illinois. Therefore, we conclude that the government demonstrated, under the preponderance standard, that venue for both money

laundering offenses was proper in the Central District of Illinois.[8]

Sax also raises a challenge to the district court's venue instruction. The district court instructed the jury on venue as follows:

> The law requires that a defendant may be prosecuted only in the judicial district in which the offense charged was committed. In the case of a charge of an offense committed in more than one district, a defendant may be prosecuted in any judicial district in which the offense was begun, continued, or completed.
>
> Therefore, you must find by a preponderance of the evidence with respect to each of Counts 1, 3 and 4 of the indictment that the offense charged was begun, continued, or completed in the Central District of Illinois.

Because the instruction does not mention Sax by name, Sax claims that the jury was not given any guidance on how to relate venue to Sax's own conduct. This, Sax reasons, was tantamount to not instructing the jury on an essential element of the money laundering offenses for which he was convicted.

Sax, however, did not raise any objection to this instruction below, which means that we would normally review his claim under the plain error standard. *See Ruiz*, 932

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[8] In addition, the fact that Sax could be held liable under *Pinkerton* for the acts of his coconspirators, coupled with the fact that both of the acts "in furtherance of" the conspiracy (money laundering) were committed in the Central District of Illinois, provides an alternative basis why venue was proper there. *See Molt*, 772 F.2d at 369.

F.2d at 1182; *McKenzie*, 922 F.2d at 1330 n. 4. But it makes no difference whether we review for "plain error," or an "abuse of discretion," for Sax's ultimate contention--that the jury was not instructed as to Sax--is flawed. The jury was obviously aware that Sax was the "defendant" being prosecuted for the offenses in counts three and four, the venue of which needed to be established in the Central District of Illinois. Moreover, as stated earlier, "proof of venue is not an essential fact constituting the offense charged." *Hatchett*, 31 F.3d at 1424. There is no error in this instruction.

E. Sentencing

In its cross-appeal, the government takes issue with the district court's refusal to apply two Guidelines enhancements to Sax's base offense level. The government first contends that the district court committed clear error when it made a factual determination that Sax was an organizer or leader of the marijuana conspiracy, yet chose not to enhance Sax's offense level by four levels pursuant to U.S.S.G. § 3B1.1(a). As its next claim of error, the government claims that the district court incorrectly determined that Sax's act of laundering Cutkomp's cash into CNA I did not constitute concealment of evidence material to the instant offense for which Sax was ultimately convicted and, therefore, did not constitute the obstruction of justice under U.S.S.G. § 3C1.1.

Before setting out our standard of review, we are compelled to address some disturbing allegations asserted by the government in this portion of its brief. In one portion of its brief, the government characterized the district court's refusal to grant an enhancement as an act of manipulation designed to achieve a result; elsewhere, the government

asserted that there was no question that the district judge had "played fast and loose with the guidelines." The government even went so far in making its case against the district court that it quotes from portions of a subsequent sentencing hearing of one of Sax's codefendants, Mr. Jeff Curtis, in which the same district judge (according to a portion quoted in the government's brief but not included therein as required by our Circuit Rule 30, thus making verification impossible) supposedly acknowledged a tendency that judges have "to play fast and loose with the guidelines in order to reach a result." This, according to the government, is conclusive proof that the district court did just that in sentencing Sax. At oral argument we took issue with these characterizations of the district judge's actions. We pointed out that the government, in making these assertions, was essentially accusing the district judge of misconduct. The AUSA assigned to this appeal assured us that it was not the government's intention to assert that the district judge in this case did not obey the law; he then went on to say that the district judge in this case refused to apply--disobeyed--the law. Perhaps the AUSA assigned to this appeal, in an attempt to vigorously make the government's case, simply employed language and phraseologies the connotations of which he had not fully contemplated. This may well be the case, for after further inquiry, we learned that the Solicitor General apparently had not had an opportunity to screen this particular brief. We suggest that, in order to avoid future unintended accusations against members of the bench, this particular United States Attorney's office take whatever steps necessary to comply with 18 U.S.C. § 3742(b), such as submitting its work product to the Solicitor General or one of his deputy solicitors for screening before seeking a review of a district judge's sentence.

Having said this, we now turn to the government's cross-appeal, bearing in mind that the district court's sentence under the Guidelines "will be upheld so long as the Guidelines were correctly applied to findings of fact that were not clearly erroneous." *United States v. Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991).

Section 3B1.1(a) provides for a four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). Factors a district court may consider in determining whether to apply the enhancement include "'the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, ... the degree of participation in planning or organizing the offense, the nature and scope of the illegality, ... and the degree of control and authority exercised over others.'" *United States v. Carson*, 9 F.3d 576, 584 (7th Cir. 1993), *cert. denied*, 513 U.S. 844 (1994) (quoting Application Note 3). This control need not be direct, however; "[e]fforts to marshall other individuals for the purpose of executing the crime" are enough to demonstrate sufficient control over a participant for purposes of § 3B1.1(a). *Id.* at 585.

At sentencing, the district court made the following statements in conjunction with determining that Sax was not an organizer or leader under § 3B1.1(a), which we reprint in full:

> I agree to a certain extent ... that sometimes it's difficult to pigeonhole exactly where a person fits in terms of role in the offense. It seems to me that Mr. Sax certainly was a leader and organizer when he went out and solicited associates in

the drug business to invest their money in those investments he had. He certainly was an organizer or leader in that sense.

He certainly didn't control or organize Mike Cutkomp and his drug dealing. He didn't have control over who he sold to here in Rock Island. To that sense he might not have been an organizer and a leader, although there is some evidence he recruited Cutkomp, but there's also some suggestion in the record that, well, I guess, Cutkomp's statement that he wasn't solicited by Sax, then there is the information, there's the testimony that apparently when Cutkomp had a problem with O'Donnell ... or other drivers he will call Mr. Sax, presumably because Mr. Sax had some role there whereby he was calling the shots or at least in the position to solve the distribution problems, the organization problems. So I certainly think there is a basis to find that the defendant was an organizer or a leader of a criminal activity that involved five or more participants or was otherwise extensive, which according to the application notes is [sic] Section 3B1.1 covers the situation where a person may not even know everybody who is involved but they have to know that a lot of other people are involved and being used to carry out the objectives.

So even though the Court feels that there is sufficient adequate basis in the record here to find that the defendant was an organizer and leader and subject to the four level adjustment, the Court will find in a cautious mode that the defendant was a manager or supervisor, and as such his role in the offense would require a three level increase, under 3B1.1(b) rather than a four level increase under 3B1.1(a).

But I want the record to clearly state the Court's judgment that the Court could very easily and the Court provides for

a four level increase because I do find there's a sufficient basis in the record to find that the defendant was an organizer or a leader, particularly with reference to the money laundering counts, but I chose not to do this for cautious reasons.

So, therefore, with reference to Objections 4 and 23 by defendant, the Court would adopt the defendant's position. Well, I take that back. The Court adopts neither the probation officer's position nor the defendant's position completely but finds that the defendant is subject to a three level enhancement for his role in the offense as a manager or supervisor.

(Emphasis added.)

Contrary to the government's assertions, we do not interpret any of these statements to be a definitive finding that Sax controlled the requisite number of participants to qualify him as an organizer or leader under § 3B1.1(a). Rather, given the conversational tone of this transcript, we think it more appropriate to characterize these statements as a careful weighing of two competing views of the evidence. That is, after wrestling with this issue, and acknowledging that there might be a sufficient evidentiary basis to support a finding that Sax was an organizer or leader within the meaning of § 3B1.1(a), the district court finally chose to come down on the side of Sax and found that, in its view of the evidence, such a determination was inappropriate. This choice between two permissible views of the evidence "cannot be clearly erroneous." *United States v. Ramos*, 932 F.2d 611, 619 (7th Cir. 1991) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 567 (1985)). At this point it was incumbent upon the government, as the party seeking to

overturn the district court's determination, to direct us to something in the record that would leave us with a "firm conviction that a mistake has been made." *Ramos*, 932 F.2d at 619 (quotations omitted) (citations omitted). It has not done so. Therefore, we will not disturb the district court's "cautious" determination that Sax was not an organizer or leader under § 3B1.1(a).

We come finally to the government's claim that the district court erred in refusing to increase Sax's base offense level by two levels for obstruction of justice under § 3C1.1. Section 3C1.1 provides for a two-level increase "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense...." U.S.S.G. § 3C1.1. Note 3(d) of the Commentary to this section provides that "concealing ... evidence that is material to an official investigation ... or attempting to do so" is an example of conduct to which the enhancement applies. Application Note 3(d).

At the sentencing hearing, the government argued that the events surrounding Sax's receipt and deposit of Cutkomp's February 1989 annual payment into CNA I demonstrated an attempt on the part of Sax to impede the investigation of his own offense of conspiracy. In February of 1989, Sax acquired Cutkomp's cash through Rick Snider, knowing at the time that Cutkomp was the target of a criminal investigation. Sax took this cash (which was proceeds of Cutkomp's marijuana sales) and personally delivered it to Abrams on February 17, 1989, stating that it was Cutkomp's annual payment to CNA I. Two months later, after denying to the authorities that he had received drug money from Cutkomp and others, Sax went over to Abrams'

home to inform him that Cutkomp was in trouble with the authorities. At that point Sax and Abrams learned that Cheryl Abrams had never deposited Cutkomp's cash payment into CNA I; Sax directed that Cutkomp's cash be deposited as usual. These events, the government claimed, demonstrated that Sax had attempted to conceal evidence material to the investigation of his own conspiracy conviction, which, in turn, demonstrated that Sax had obstructed justice within the meaning of § 3C1.1. The district court denied this enhancement, and adopted the view of the probation officer that Sax's conduct did not obstruct the investigation of the offense for which he was convicted. This was clearly erroneous. Cutkomp's cash was the proceeds of his marijuana sales which flowed from the conspiracy in which Sax was still a member. Thus, this cash was evidence relevant to establishing the charge of conspiracy to distribute marijuana for which Sax was convicted. *See Brown*, 944 F.2d at 1383. That being the case, Sax's statement to the investigating authorities denying any knowledge of Cutkomp's drug activities, as well as his subsequent laundering of Cutkomp's drug monies, fell squarely within the definition of obstructing justice under § 3C1.1. But contrary to the government's assertions, this was not due to a conscious disregard of the evidence or the Guidelines; rather, we view this as simply an incorrect interpretation of what constituted the "instant offense" to which this enhancement was being applied. For that reason, we vacate this portion of the district court's sentence and remand for resentencing.

III.

For the foregoing reasons, Sax's convictions for conspiracy under 21 U.S.C. § 846 and money laundering under 18 U.S.C. § 1956(a)(1)(B)(i) are AFFIRMED. We

VACATE that portion of Sax's sentence regarding the issue of the two-level enhancement for obstruction of justice under § 3C1.1, and REMAND for resentencing consistent with this opinion.

In the
United States Court of Appeals
for the Seventh Circuit

No. 93-3447

UNITED STATES of AMERICA,

Plaintiff-Appellee,

v.

JEFFREY PAUL CURTIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
Joe Billy McDade, *District Judge.*

Argued May 9, 1994-Decided Sept. 29, 1994

Before MESKILL,* FLAUM, and MANION, Circuit Judges.

FLAUM, *Circuit Judge*. Jeffrey Paul Curtis was sentenced to 262 months imprisonment after a jury found him

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* The Honorable Thomas J. Meskill of the United States Court of Appeals for the Second Circuit is sitting by designation.

guilty of conspiracy to distribute marijuana and acquitted him of a companion charge of money laundering. On appeal, Curtis raises four arguments: (1) that the district court erred in admitting hearsay statements of a co-conspirator; (2) that the evidence presented at trial was insufficient to prove a single conspiracy; (3) that the court erred in imposing a sentence enhancement for obstruction of justice; and (4) that the court erred in denying a reduction for acceptance of responsibility. We affirm.

I.

In May 1992, Curtis and four others were charged with conspiracy to distribute marijuana between 1982 and 1988 and money laundering. Two of the defendants were alleged to have been involved as distributors throughout the period while the other three were thought to have participated as successive suppliers. Three of the defendants entered into plea agreements, and in January 1993, the district court granted Curtis' pre-trial motion to sever his trial from that of the remaining co-defendant, Martin Sax, whom the government contended was the original supplier. The government then sought and obtained a new indictment against Curtis in February 1993, charging the same two violations but limiting the dates of the alleged conspiracy to the years in which Curtis was the supplier.

Curtis remained out of custody while awaiting trial on the original indictment and appeared in Peoria for arraignment on the new indictment on March 15, 1993. At that time the court scheduled a further hearing for March 18 to discuss the conditions of release. Curtis failed to appear in Peoria as directed on the 18th; instead he turned himself in that day to the United States Marshal in Tucson, Arizona. On

account of Curtis' disobedience, the court ordered him to remain in custody throughout trial and sentencing.

At trial the government called several witnesses who testified that Curtis had supplied substantial amounts of marijuana to two major Illinois distributors, Mike Cutkomp and Joe Cullinane, from 1986 to 1989. The government's key witnesses were Cullinane himself and Mike Cutkomp's former wife, Karen. Cullinane testified that Cutkomp had introduced him to Curtis and helped facilitate their initial transaction in 1986. For some time thereafter Cullinane used his own couriers to transport the marijuana from Arizona to Illinois, but later received his deliveries from Curtis' trucks. Cullinane asserted that after the initial transaction, his arrangements with Curtis were conducted separately from Cutkomp's and that the two Illinois dealers did not consider themselves to be partners. One of Cullinane's couriers, Ron Witt, testified that he had driven several truck-loads of marijuana supplied by Curtis for distribution in Illinois. Witt was aware that Curtis was supplying marijuana to both Cullinane and Cutkomp.

At trial Karen Cutkomp testified to statements made to her by her husband during the course of the alleged conspiracy. Curtis objected to the admission of these statements, which he contended were not made in furtherance of the conspiracy, but the court overruled the objection and allowed the testimony. Karen Cutkomp also testified that while she and her then-husband were en route to Mexico (attempting to remain a step ahead of law enforcement authorities) they met with Curtis in Tucson and turned over to him approximately $225,000 in marijuana proceeds that Curtis later delivered to a man in Nogales, Arizona, according to their instructions. In addition, Karen Cutkomp's

mother, Rosina Jech, testified that she had served as a drug courier between Tucson and the Quad Cities area and had been introduced to Curtis in Tucson through Mike Cutkomp.

Curtis neither testified nor presented witnesses on his own behalf. He did, however, make a statement to investigators on December 13, 1990. At that time, Curtis admitted that Marty Sax had introduced him to Mike Cutkomp and that he knew that Cutkomp was a fugitive. Curtis denied having any correspondence or business dealings with Cutkomp, though he recalled meeting Rosina Jech and Joe Cullinane and stated that his business had access to trucks. Curtis' trial strategy relied on two principal arguments. First, he hoped that the jury would discount the testimony of the key witnesses against him on the basis of their own criminal conduct and a perception that their credibility might be tainted by their obvious incentive to curry favor with the prosecution. Second, he argued that the government had proven two separate conspiracies (Curtis-Cutkomp and Curtis-Cullinane) rather than one all-encompassing conspiracy (Curits-Cutkomp-Cullinane).

At the jury instruction conference, Curtis successfully argued for the inclusion of Defendant's Instruction No. 1, which stated:

> Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more persons. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed,

you must determine who were the members of that conspiracy.

To find the defendant guilty, you must find that he was a member of the conspiracy charged in the indictment.

The jury returned a verdict of guilty on the conspiracy to distribute marijuana charge, and a verdict of not guilty on the money laundering charge.

At sentencing, the court imposed a two-level upward adjustment for obstruction of justice, U.S.S.G. § 3C1.1, and denied Curtis' request for a two-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1. The court sentenced Curtis to 262 months imprisonment, the lowest possible sentence within the applicable guideline range.

II.

A.

We turn first to Curtis' argument that an impermissible variance existed between the indictment and the proof at trial. Specifically, Curtis contends that while a rational jury may have concluded that he had supplied a large quantity of marijuana to both Cullinane and Cutkomp, there was insufficient evidence to link all three in a single conspiracy. Drawing upon this court's decisions in *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991) and *United States v. Napue*, 834 F.2d 1311 (7th Cir. 1987), Curtis maintains that no single overarching scheme existed because his arrangement with Cullinane was separate from and not in any way dependent upon the agreement he made with Cutkomp. In response, the government asserts that Cullinane and Cutkomp had acted in concert long before Curtis became

their supplier and continued to receive joint shipments from Arizona at various points during the purported Curtis-Cullinane-Cutkomp conspiracy. Moreover, the government suggests that several additional pieces of evidence--the number of long distance telephone calls between the three parties, the size of the marijuana shipments (on occasion over 1,000 pounds) and the fact that Cullinane absorbed an entire shipment after Cutkomp fled to Mexico as a favor to Curtis--give rise to an inference of mutual support and dependence. Curtis responds that the permissible inferences to be drawn from the evidence extend no further than that Cullinane and Cutkomp knew each other, talked on the phone, and had the same type of business relationship with Curtis.

A defendant asserting a claim of variance will succeed in obtaining reversal of his conviction only if he establishes that (1) the evidence presented at trial was insufficient to support the jury's finding of a single conspiracy, and (2) he was prejudiced by the variance. *See United States v. Testa*, 33 F.3d 747, 750 (7th Cir. 1994); *Townsend*, 924 F.2d at 1390; *see also* Fed.R.Crim.P. 52(a). We have stated on numerous occasions that the jury gets "first crack" at deciding "whether there is one conspiracy or several when the possibility of a variance occurs," *see e.g.*, *United States v. Nava-Salazar*, 30 F.3d 788, 796 (7th Cir. 1994); *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir. 1990), *cert. denied*, 499 U.S. 924 (1991), because a question of variance is a question of fact within the jury's realm of expertise. *Paiz*, 905 F.2d at 1019. Where, as here, the parties argued and the jury was instructed as to the dispute concerning the number of possible conspiracies, our initial inquiry simply becomes one of the sufficiency of the evidence. Thus, we view the evidence most favorably to the government, and we uphold a jury's factual

conclusion that a single conspiracy existed if any rational trier of fact could have found, beyond a reasonable doubt, the one conspiracy. *United States v. Emenogha*, 1 F.3d 473, 480 (7th Cir. 1993) (citations omitted). Finally, even if we do not find sufficient evidence of a single conspiracy, the variance will be fatal to the government's case only if the defendant can demonstrate prejudice. *Townsend*, 924 F.2d at 1410. This additional requirement reflects the understanding that "[t]he crime of conspiracy focuses on agreements, not groups;" accordingly, the government "need only prove that the defendant joined the agreement alleged," and need not establish the group of coconspirators with whom the defendant joined. *See Testa*, 33 F.3d at 750 (citing *Townsend*, 924 F.2d at 1389).

In this case, the government does not present strong direct evidence of a common scheme or agreement involving all three men--for example, evidence showing that Cullinane and Cutkomp drew support from or depended in some way upon the success of each other's distribution networks. However, as we have noted previously, we need not limit our search to direct evidence. *Townsend*, 924 F.2d at 1390; *United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990). The "elastic and sprawling" nature of drug (and other) conspiracies, *see Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring), often requires juries to sort, weigh, and draw conclusions from circumstantial evidence and limits the likelihood that a "smoking gun" will be found that implicates all who have been charged. In these circumstances, the critical question becomes "whether the jury may reasonably infer a single agreement among the defendants from the evidence of the drug transactions presented by the government." *Townsend*, 924 F.2d at 1390.

We agree with Curtis that the evidence arguably establishes multiple conspiracies, but we may not find a variance unless no reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment. Here we are persuaded that the circumstantial evidence, though relatively weak in its component parts, was sufficient to permit an inference of a single overarching agreement when viewed cumulatively. Examining the evidence in the light most favorable to the government, as we must, we believe that the jury could have found a unitary Cullinane/Cutkomp/Curtis conspiracy on the basis of the evidence presented about the genesis and evolution of the drug distribution network. Cullinane and Cutkomp had a long relationship of conspiring to distribute marijuana that was marred by an inconsistent supply. Cutkomp was the first to discover Curtis as a potentially stable source, and, satisfied with his performance, recommended Curtis to Cullinane. Furthermore, Cutkomp introduced Cullinane to Curtis in Tucson and even helped package and load the initial quantity of marijuana sold by Curtis to Cullinane. Thereafter the three men remained in contact (as evidenced by the phone records) and Curtis ordinarily sent single trucks from Arizona to make two deliveries, one to Cutkomp in the Quad Cities and the other to Cullinane in the Chicago area. After Cutkomp fled to Mexico, however, Cullinane received full loads for a short time (because half was no longer being unloaded in the Quad Cities), but he soon terminated the arrangement because undertaking to resell full loads caused him to bear too much risk. Thus, the jury could have inferred that the enterprise collapsed once Cutkomp could no longer participate. Though the sum of this evidence does not produce the most compelling case for the existence of a single overarching

conspiracy, we conclude that it crosses the rather low threshold that it must to withstand appellate review.

Even if we were to assume that no rational jury could have found a single conspiracy as alleged in the indictment, the resulting variance would have been harmless error as it would not have unfairly denied Curtis of a fair trial and sentencing. As we have observed on several occasions, the Supreme Court has looked to the following factors to determine whether prejudice has resulted from a variance between indictment and proof: (1) surprise to the defendant resulting from the variance, (2) possibility of subsequent prosecution for the same offense, (3) likelihood of jury confusion as measured by the number of conspirators charged and the number of separate conspiracies proven, and (4) likelihood of jury confusion in light of the instructions giving the jury limiting or excluding the use of certain evidence not relating to a particular defendant. *See, e.g.*, *Townsend*, 924 F.2d at 1410-11; *United States v. Lindsey*, 602 F.2d 785, 787-88 (7th Cir. 1979). To this list we have added the possibility of prejudice arising from introduction of co-conspirator hearsay evidence and from an enhanced sentence computed on the basis of the drug-related activities of others with whom the defendant did not conspire. *United States v. Aquilla*, 976 F.2d 1044, 1052 (7th Cir. 1992); *Townsend*, 924 F.2d at 1412. At the same time, however, we have noted that the need to precisely distinguish between a single conspiracy and multiple conspiracies diminishes considerably where, as here, the defendant is the common link between the alleged coconspirators. *See United States v. Flood*, 965 F.2d 505, 509 (7th Cir. 1992); *United States v. Noble*, 754 F.2d 1324, 1330 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985); *see also United States v. Johnson*, 32 F.3d 265, 268 (7th Cir. 1994) ("There is little, if any, need for a

multiple conspiracy instruction when the defendants are at the hub of the various possible agreements."); *Napue*, 834 F.2d at 1333 ("Even if there were two conspiracies, [where the defendant is the hub of these conspiracies] it is usually not necessary to explore the ways in which the plan might be recast as a series of more limited agreements.").

Applying these principles to the facts of this case, there could be no prejudice. Curtis was the only person on trial, thus eliminating the customary concern with jury confusion resulting from the "spillover" effect associated with simultaneously trying multiple defendants with various connections to the purported scheme. In addition, the evidence clearly demonstrated that Curtis operated as the common supplier to both Cullinane and Cutkomp throughout the time period charged in the indictment. As we explained in *Flood*, this evidence, placing Curtis at the hub of the conspiracy, means that his actions are viewed in a different light than those of his confederates. Though Cullinane or Cutkomp might plausibly have argued that they "lacked knowledge of the reach or likely reach of the conspiratorial network," *Flood*, 965 F.2d at 509 (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)), Curtis surely knew all of the important details--to whom he was selling and in what amounts--and he therefore was not prejudiced by the admission of statements made by his co-conspirators or by having his sentence calculated according to the quantity he sold to both Cullinane and Cutkomp.

B.

Curtis next argues that the district court improperly admitted into evidence, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, testimony of Karen Cutkomp

relating to conversations she had with her husband during the course of the alleged conspiracy. Curtis objected to this testimony both before and during trial, and the court granted a continuing objection after overruling two specific objections during the government's direct examination.

Statements by a co-conspirator may be introduced against other conspirators if the government demonstrates that: (1) a conspiracy existed; (2) the defendant and the declarant were members thereof; and (3) the offered statement was made during the course of and in furtherance of the conspiracy. *United States v. Robinson*, 956 F.2d 1388, 1394 (7th Cir. 1992) (citations omitted). We review a district court's findings with respect to these elements for clear error. *Id.* This means that we will not disturb the trial court's ruling if a reasonable basis exists for concluding that the statements furthered the conspiracy, even if an alternative explanation is equally plausible. *See Garlington v. O'Leary*, 879 F.2d 277, 284 (7th Cir. 1989); *United States v. Molinaro*, 877 F.2d 1341, 1345 (7th Cir. 1989).

Curtis appears not to contest the first two prongs of the inquiry; rather he insists simply that Karen Cutkomp's statements did not satisfy the "in furtherance" requirement. In *United States v. Johnson*, we stated that Rule 801(d)(2)(E) is a "limitation on the admissibility of co-conspirators statements that is meant to be taken seriously." 927 F.2d 999, 1001 (7th Cir. 1991) (citing *Garlington*, 879 F.2d at 283). We explained further that the "in furtherance" requirement would be satisfied where the statement is "part of the information flow between conspirators intended to help each perform a role," and provided as examples statements made to "recruit other conspirators, control damage to an ongoing conspiracy or keep conspirators advised about the progress of

the conspiracy." *Johnson*, 927 F.2d at 1002. At the other end of the spectrum, we noted that "mere idle chatter, narrative declarations, and superfluous casual remarks" do not constitute statements "in furtherance" of a conspiracy. *Id.*

Curtis calls our attention to a particular exchange during his counsel's cross-examination of Karen Cutkomp that, he suggests, belies the notion that Mike Cutkomp's statements to Karen Cutkomp were made "in furtherance" of the conspiracy. The dialogue went as follows:

Q. Now, when--there's a number of times you've testified on direct that Mike would talk to somebody and then tell you what happened?
A. Yes.
Q. Was that kind of on the order of if Mike had had a regular, you know, 9:00 to 5:00 straight job, a guy would come home and tell his wife what happened at work today?
A. Mike would.
Q. Yeah. I mean those conversations with you were on like that. Right?
A. Yes.
Q. They weren't necessary to keep the marijuana conspiracy going?
A. No.
Q. It was just him letting you know what was going on?
A. Yes.
Q. And it wasn't like you were going to, it wasn't like he was asking you for--to help him in the marijuana business by telling you these things?
A. No.
Q. All right. And the only time he sought your advice, he ignored it, the deal about the $60,000 with Rick Snider?
A. He was good at asking my opinion and then not using it.

Q. So it's not like he was using you as his consigliere to find out how he should do things in the marijuana business?
A. Call it sounding board, is all.
Q. Just a guy coming home and talking to his wife about what's going on in the business?
A. Yes.

Trial Tr. 5/4/93, pp. 114-115. The witness' own general characterizations of the nature of her testimony, however, cannot obscure the more specific details of her direct examination that indicate a greater import to the statements at issue. For example, in view of the fact that Karen Cutkomp's mother transported the marijuana from Arizona to the Quad Cities on numerous occasions, we find it likely that Mike Cutkomp's statements to Karen about the transportation arrangements were not merely dinnertime conversation between husband and wife, but rather were made to relate the need for Karen's mother to remain involved in the conspiracy. Likewise, Mike Cutkomp's statements to his wife about the substance of telephone calls he had made from Mexico to Curtis most likely were made to advise her of the extent to which law enforcement authorities appeared to have caught wind of the conspiracy and of the likelihood of their being able to return to the Quad Cities, or the United States generally. Curtis does not protest any other specific statements, though both at trial and appeal he registered his general objection to the entire line of inquiry. Based on our review of the record, we cannot conclude that the district judge committed clear error in admitting Karen Cutkomp's testimony in its entirety, and accordingly we do not disturb his rulings.

C.

With respect to sentencing, Curtis first appeals the district court's decision to apply a two-level enhancement to his base offense level for obstruction of justice. U.S.S.G. § 3C1.1. We review this determination for clear error, *United States v. Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991), meaning that we will reverse only if we reach a "firm and definite conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989).

U.S.S.G. § 3C1.1 states in its entirety:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by two levels.

As the Application Notes explain, this enhancement applies to "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding, ... or attempting to do so," Note 3(d), and to "willfully failing to appear, as ordered, for a judicial proceeding." Note 3(e). Furthermore, under § 3C1.1, "the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused." Note 7.

In this case, the only relevant conduct giving rise to the enhancement was Curtis' role in receiving from the Cutkomps approximately $225,000 in drug proceeds, temporarily concealing that money, and later releasing the funds to a courier in Nogales, Arizona, pursuant to directions

from the Cutkomps. In *Brown*, we upheld an enhancement for obstruction of justice where the defendant himself turned over the proceeds of marijuana sales to another person "for safekeeping" after the defendant became aware that he was the subject of a criminal investigation. 944 F.2d at 1383. Curtis argued, and the district court agreed, *see* Sent. Tr. at 81, that *Brown* was silent as to whether the person who received the money also qualifies for the enhancement. However, explicitly relying on Application Note 7, the court found that Curtis accountable for obstruction of justice on an aiding and abetting theory. On appeal, Curtis states that he often received large payments from Cullinane and Cutkomp and suggests that the receipt of the $225,000 was "as likely to be simply another act in furtherance of the conspiracy and not an act designed to conceal its existence." This argument is not persuasive. Even if we accept that Curtis frequently received large sums of cash from his co-conspirators, as payment for marijuana, this does not explain why Curtis subsequently turned the money over to a third party at a location along the U.S.-Mexico border for return to the purported purchaser. The much more likely conclusion, and the one drawn by the district court, is that Curtis knew that the Cutkomps were "on the lam." In these circumstances, we find the enhancement for obstruction of justice to be appropriate.

D.

Curtis also contends that the district court erred in denying Curtis' request for a two-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1. Because this issue presents a factual question, depending largely on credibility assessments of the sentencing judge, we give great deference to the district court's reasoned conclusion and

reverse only for clear error. *See United States v. Guadagno*, 970 F.2d 214, 224 (7th Cir. 1992); U.S.S.G. § 3E1.1 Application Note 5.

Under § 3E1.1, a defendant is entitled to a reduction of his sentencing exposure only if he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." *United States v. Rivero*, 993 F.2d 620, 622-623 (7th Cir. 1993). As the Commentary and Application Notes make clear, only in "rare situations" may a defendant clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. See Application Note 2. We have noted that the "rare situation" envisioned by the Sentencing Commission involves a defendant who concedes his factual guilt (i.e. that he has engaged in the charged conduct) before trial, but challenges the general content or specific application of a statute. *See Rivero*, 993 F.2d at 624; *Guadagno*, 970 F.2d at 226.

The district court relied on several factors in determining that Curtis had not accepted responsibility for his criminal conduct: (1) Curtis chose to go to trial rather than pleading guilty (at least to Count I); (2) Curtis violated the conditions of his pre-trial release by failing to appear at a scheduled court appearance and by having contact with his one-time co- defendant, Martin Sax; and (3) its determination that Curtis had obstructed justice, a finding that except in extraordinary cases, see U.S.S.G. § 3E1.1 Application Note 4, indicates that a defendant has not accepted responsibility. Sent. Tr. at 75-77. Curtis contests each of the rationales for the district court's conclusion. He posits first that the jury's verdict of acquittal vindicated his decision to go to trial on Count II. The decision to go to trial on Count I, he insists, did

not represent a denial of guilt; rather he simply wished to preserve a technical legal issue--whether the conduct to which he admitted constituted one or two conspiracies--while conceding that he committed the acts for which he stood accused. With respect to the failure to appear, Curtis suggests that his actions did not evidence an avoidance of responsibility so much as they reflected an avoidance of Peoria. In essence, Curtis asks us to view his unilateral decision to turn himself in to authorities in Tucson as irrelevant to the applicability of § 3E1.1. Finally, Curtis argues that the unique facts of this case--the behavior giving rise to the obstruction penalty occurred long before the indictment and Curtis admitted his involvement in a timely fashion relative to the date of his indictment--present one of the rare circumstances in which a reduction for acceptance of responsibility may be reconciled with an enhancement for obstruction of justice.

Like the district court, *see* Sent. Tr. at 75, we find Curtis' arguments interesting, though ultimately unpersuasive. The Sentencing Guidelines explicitly state that the acceptance of responsibility reduction is available only in "rare" or "extraordinary" circumstances if a defendant either puts the government to its burden of proof at trial or is determined to have obstructed justice. *See* U.S.S.G. § 3E1.1 Application Notes 2 and 4. Accordingly, a defendant like Curtis, who has both gone to trial and obstructed justice, must overcome quite a strong presumption to convince a court that he still is entitled to a reduction for acceptance of responsibility. We conclude that he has not done so. Curtis went to trial on Count I not to contest the constitutionality or applicability of a statute, but rather because he thought there was a variance between the indictment and the proof. We have characterized a variance as a challenge to the sufficiency

of the evidence, *see Testa*, 33 F.3d at 750, and we find no indication, either in the Guidelines themselves or in the case law, that this type of claim falls within the "rare situations" exception contemplated in Application Note 2. We also believe that Curtis' violations of the conditions of his pre-trial release and his failure to appear at a hearing after receiving notice thereof reflect negatively on the extent of Curtis' acceptance of responsibility for his criminal conduct and affirmatively demonstrate the limits of his rehabilitative efforts. The district court appropriately considered these transgressions and the circumstances surrounding Curtis' decision to go to trial on Count I in concluding that Curtis was not entitled to a reduction under § 3E1.1.

III.

For the foregoing reasons, we affirm Curtis' conviction and sentence.

Supreme Court of the United States

No. 94-1159

JEFFREY P. CURTIS, petitioner,
v.
UNITED STATES.

Feb. 21, 1995

Case below, 37 F.3d 301.

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

21 U.S.C. § 841

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of

law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an

individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline

participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a

controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this

title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Redesignated (f)